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IN THE

Supreme Court of the United States

JEFFREY J. REED,
Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Title VII requires unions to reasonably accommodate employees' religious beliefs. Must an employee suffer discharge or discipline as a prerequisite to challenging the reasonableness of a labor union's religious accommodation?

2. The lower courts have uniformly agreed that employees who have religious objections to supporting labor unions may, as a reasonable accommodation under Title VII, redirect their compulsory union fees to charity. Where a labor union requires that the religious objector must pay more than any other member of the bargaining unit to retain employment, is that a reasonable accommodation?

PARTIES TO THE PROCEEDINGS

The parties before this Court are employee Petitioner Jeffrey J. Reed and Respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW").

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jeffrey Reed respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Sixth Circuit is reported at 569 F.3d 576 (6th Cir. 2009) and is reproduced at Appendix ("App.") 1a. The opinion of the United States District Court for the Eastern District of Michigan is reported at 523 F. Supp. 2d 592 (E.D. Mich. 2007) and is reproduced at App. 55a. The cause determination letter of the Equal Employment Opportunity Commission is reproduced at App. 73a.

JURISDICTION

The Court of Appeals issued its original reported opinion (564 F.3d 781) on May 7, 2009. App. 28a. Petitioner filed a timely petition for rehearing *en banc* on May 15, 2009. The panel withdrew its original opinion and entered an amended opinion on June 23, 2009. Petitioner filed a timely petition for rehearing *en banc* on June 24, 2009, which the Court of Appeals denied on September 21, 2009. App. 75a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(c) of Title VII of the Civil Rights Act of 1964 provides:

> (c) Labor organization practices
> It shall be an unlawful employment practice for a labor organization—
>
> > (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his . . . religion . . . .

42 U.S.C. § 2000e-2(c)(1).

Section 703(a) of Title VII of the Civil Rights Act of 1964 provides:

> (a) Employer practices
> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . .

42 U.S.C. § 2000e-2(a)(1).

Section 701(j) of Title VII of the Civil Rights Act of 1964 provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j).

STATEMENT OF THE CASE

Jeffery Reed challenges the Sixth Circuit's split decision that he must be fired, or experience some sort of employment discipline, before he is eligible to contest the union's requirement that he pay substantially more in compulsory union fees than any other objecting employee. On this point, the Circuits are in disagreement.

When an employee's religious beliefs conflict with an employment requirement, Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) requires that a reasonable accommodation be attempted. Mr. Reed has religious objections to supporting the union. The union's accommodation is to require him to make, as a condition of employment, a charity payment in an amount approximately 22% greater than any other objecting employee must pay.

The dissenting judge on the Sixth Circuit panel found that Mr. Reed need not suffer discharge or discipline as a prerequisite to challenging this scheme, and that the majority opinion was in conflict on this point with decisions of the First, Second, Fourth, Seventh and Ninth Circuits. App. 17a. In

fact, the various Circuits are in turmoil over the necessary elements of a prima facie case of religious accommodation.

This Court granted a writ of certiorari to define the elements of a prima facie case for religious accommodation in *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 67 (1986), but failed to reach that issue. It remains unresolved by the Court to this day.

I. FACTS

Mr. Reed assembles vehicles for AM General. The UAW is Mr. Reed's exclusive bargaining representative. The UAW and AM General entered into a contract requiring Mr. Reed to join the union or pay union fees as a condition of employment.

Mr. Reed sincerely believes that the UAW supports activities that are in conflict with the will of God and the historic teachings of his church. He informed the UAW of the conflict, and then followed the UAW's procedure for applying for a religious accommodation that would allow him to redirect his compulsory union fees to a charity. In accord with the UAW policy, and to show that he did not seek any financial advantage, Mr. Reed offered to make an alternative payment to the Disabled American Veterans.

The UAW constitution grants to voluntary union members the right to object to the political portion of its dues and to receive a rebate of that amount. This allows UAW members to pay less than 100% of full dues and to avoid supporting union politics. Similarly, non-union employees have the right to refrain from paying that portion of dues devoted to politics. *Communications Workers of Am. v. Beck*, 487 U.S. 735 (1988) (compulsory union fees can reflect union bargaining costs, but not union political costs). This

allows non-union employees who object to pay less than 100% of full dues and to avoid support for union politics.

As a result, no employee in Mr. Reed's bargaining unit is required to pay full dues to retain employment. They can all, UAW member and non-member alike, choose to pay less than 100% of the full dues amount and still remain employed.

The UAW calculates that approximately 22% of its dues dollar is devoted to politics. Therefore, the UAW claims its *Beck* fee (the amount it does not spend on politics) is about 78 cents of every dues dollar. Mr. Reed does not challenge the UAW's calculation. The result is that every employee in the bargaining unit must pay only $78 of every $100 claimed by the UAW in dues to fulfill all legal obligations and retain employment under the union contract. Paying less than full dues is an option available to both voluntary UAW members and non-UAW employees.

Mr. Reed, who is not a union member, offered to make his charity-substitution payment in the *Beck* amount, so that the amount of his charitable payment would not reflect what the UAW officials spend for politics.

After initial resistance, the UAW agreed to accommodate Mr. Reed's religious beliefs through a charity-substitution payment, but rejected his suggested charity. Instead, it informed him of three other charities to which he could make payment to retain his employment at AM General.

While waiting for the UAW to decide on his religious accommodation request, Mr. Reed had been paying the 78% "*Beck*" fee. When the UAW agreed to

accommodate Mr. Reed, it required him to provide proof of a retroactive payment to the charity in the amount of 100% of union dues, after which it would refund to Reed the *Beck* amount he had paid. That resulted in Mr. Reed having to immediately pay an additional $100, and then continue to pay approximately 22% more than he previously paid. Paying this additional tariff will go on for as long as he remains an AM General employee.

Mr. Reed objected because he was the only employee, union member or non-member, required to pay the full dues amount—including that portion the UAW calculated that it used for politics. Because he is a religious objector, Mr. Reed alone is required to pay an amount equal to 100% of the UAW's dues, and not the 78% of dues that is available to every other employee. App. 4a (Reed is required to make "a monthly charity payment approximately 22% greater than what he would pay the UAW as an objecting member or nonmember.").

II. PROCEEDINGS BELOW

When the UAW refused to grant him an accommodation that limited the amount of the charity payment to that paid by other objecting nonmembers, Mr. Reed filed a charge with the EEOC. Upon investigation, the Commission issued a letter finding cause to believe that the UAW refused to give Mr. Reed a non-discriminatory reasonable accommodation of his sincerely held religious beliefs.

To enforce the EEOC's decision, Mr. Reed sued in federal court. Mr. Reed challenged only the *amount* of his required charity payment. He sought a return of the excessive fees he had paid, and a judgment that he must only pay the *Beck* amount in the future.

On cross-motions for summary judgment, Mr. Reed and the UAW argued only whether a charitable payment fee equal to dues was a reasonable accommodation. The federal district court, *sua sponte*, determined that, before Mr. Reed could challenge the amount of his accommodation payment, he must prove all elements of a religious accommodation case, including proof of "discharge or discipline." App. 63a-64a. Noting that Reed was "still employed," App. 64a, the trial court found that it need not consider the reasonableness of the accommodation offered to him. App. 66a.

Nevertheless, the district court also opined that, because almost all employees *voluntarily* paid the full dues amount, it was not discrimination to force Mr. Reed to pay, over his objection, 100% of dues to a charity. App. 69a.

A three-judge panel of the Sixth Circuit Court of Appeals issued three separate opinions. Judge Batchelder's opinion affirmed on the basis that Mr. Reed failed to establish that he had been discharged or disciplined. She found that in the absence of such harm, the union had no duty to make any sort of accommodation for Mr. Reed. App. 34a. She refused to consider whether discharge or discipline "should be understood to include any adverse employment action," because she did not believe that Mr. Reed had shown any adverse action. App. 36a.

Judge Guy's concurring opinion did not pass on the issue of whether Mr. Reed had shown a prima facie case, but found that requiring Reed to pay more than any other employee was a "reasonable and nondiscriminatory accommodation" because many union members voluntarily paid 100% of dues. App. 39a.

Judge McKeague, dissenting, found that the Sixth Circuit "incorrectly" required a different level of harm in religious accommodation cases than it required in disparate treatment cases. App. 43a. He determined that five other circuits used a different standard. App. 45a.

Even if the Sixth Circuit should continue to require "discharge or discipline" in religious accommodation cases against employers, Judge McKeague concluded that there is no reason to apply that standard to labor unions: "As a union can neither discharge nor discipline an employee," application of that "element in claims against unions would foreclose all such claims." App. 46a.

As to whether Mr. Reed suffered an "adverse action," Judge McKeague thought it was "clear that Reed did suffer an adverse employment action."App. 46a.

He believed the circuit had an obligation to explain what would constitute a prima facie case against a union, because the language of Title VII suggests a different standard applies in cases against employers as opposed to unions. App. 46a-47a.

Because Mr. Reed was required to "make larger payments than secular objectors," Judge McKeague determined that he had suffered a materially adverse action, for it resulted in Mr. Reed "receiving less net income." App. 48a.

Judge McKeague noted that under the opinions of the other two judges, employees of faith "can do nothing but lose." App. 50a. Either the employee accepts the unreasonable accommodation, or the employee "puts his or her employment in jeopardy."App. 50a.

Having concluded that Mr. Reed proved a prima facie case, Judge McKeague addressed the reasonableness of the union's accommodation. He found it unreasonable because a union lacks the authority to charge objecting non-members more than the 78% *Beck* amount. App. 51a-52a. Finally, Judge McKeague determined that the union had a discriminatory motive for imposing higher fees on religious objectors: to deter others from asserting religious objections. App. 53a.

When Mr. Reed petitioned for rehearing *en banc*, the panel withdrew its opinions, and then filed three virtually identical opinions. App. 1a ff. The only substantive difference was that Judge Guy changed a portion of one line of his opinion to agree that Mr. Reed had not made out the elements of a prima facie case. *Compare* App. 12a with App. 39a.

Mr. Reed filed a second petition for rehearing *en banc* that was subsequently denied by the Circuit.

REASONS FOR GRANTING THE WRIT

Nearly twenty-five years ago this Court resolved to settle the question of what an employee must prove to claim a reasonable religious accommodation in the workplace. However, it failed to follow through on the very element at issue here. The result is that the circuits are now evenly divided on the question.

The majority of the split panel below believed that Mr. Reed must be fired or disciplined in order to challenge the reasonableness of the union's requirement that he pay more in compulsory fees than all other employees, non-member and union member alike, are required to pay to retain employment. Requiring discharge or discipline is inconsistent with this Court's recent instructions to the Sixth Circuit in

a parallel case, inconsistent with the decisions of other circuits, inconsistent with the language of Title VII, inconsistent with common sense (unions do not wield the power of the employer), and inconsistent with the common practice of allowing unions an involuntary deduction of their fees from employee paychecks.

Permitting a union to impose a religious accommodation that compels employees of faith to pay more than all other employees is inconsistent with this Court's precedents. This Court requires a non-discriminatory accommodation and places a cap on the amount of union fees that can be charged to objecting employees.

I. THIS COURT PREVIOUSLY GRANTED CERTIORARI TO RESOLVE THE ELEMENTS OF A PRIMA FACIE CASE FOR RELIGIOUS ACCOMMODATION, BUT FAILED TO DO SO.

In the landmark case *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court defined the elements of a prima facie case for disparate treatment claims (including religious discrimination) under Title VII. In *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 66-67 (1986), this Court granted a writ of certiorari to define the elements of a prima facie case for religious accommodation, but did not reach that issue. It remains unresolved.

Title VII not only bars religious discrimination, it affirmatively requires reasonable religious accommodation in employment. In modern labor relations, employer targeting of a specific religion for disparate treatment is uncommon. Far more common is the clash between an employee's unique religious beliefs

and a neutral workplace rule. Thus, the elements of the more common of the two classes of Title VII religion claims remain undefined by this Court.

The majority below required "discharge or discipline" as an element of a prima facie case for religious accommodation. Nowhere in the statute does Congress require any sort of "adverse action" as a prerequisite to the right of religious accommodation, much less state that an employee must be fired or disciplined. The clear statutory mandate to attempt an accommodation is antithetical to the idea that an employee must first suffer discharge or discipline before being eligible to obtain an accommodation.

As discussed next, the Sixth Circuit's "discharge or discipline" requirement conflicts with decisions of other circuits—and those circuits are themselves divided over what type of adverse action can be required.

II. THE COURTS OF APPEALS ARE DIVIDED ON THE QUESTION OF WHETHER DISCHARGE OR DISCIPLINE IS A REQUIRED ELEMENT OF A PRIMA FACIE CASE FOR RELIGIOUS ACCOMMODATION.

A. The circuits are equally divided.

In his opinion, Judge McKeague determined that five other circuits use a different standard than what the Sixth Circuit applies. App. 17a. In the Sixth Circuit, an employee must show the following elements for a prima facie case for religious accommodation: 1) a sincere religious belief in conflict with a work requirement; 2) notice to the employer or union about the conflict; and, 3) employee discharge or discipline over the conflict. App. 6a-7a.

The first two elements are consistent with the statute and common sense. They are also consistent with other circuits' decisions. The unsettled point is the third element, often referred to as the "adverse action" element. The validity of this third element was the question upon which this Court granted review in *Ansonia*, but did not resolve. 479 U.S. at 66-67.

The Sixth Circuit's requirement that an employee be discharged or disciplined as a condition of asserting a religious accommodation claim is consistent with language used in religious accommodation opinions of the Third, Fourth, Fifth, Tenth and Eleventh Circuits. Indeed, the Tenth and Eleventh Circuits use only the terms "discharged," "fired," or "not hired," and do not refer to "discipline." The problem with asserting that all of these circuits are in complete accord with the Sixth is that in those cases the employees were, in fact, discharged or disciplined.

However, the First, Second, Seventh, Eighth and Ninth Circuits do allow the "adverse action" element in religious accommodation cases to be satisfied by adverse action that is less than discharge or discipline. What follows is a brief survey of what the circuits require for adverse action in a religious accommodation case.

B. Five circuits use "discharge or discipline" to define adverse action.

The Third Circuit, in *Shelton v. University of Medicine & Dentistry of New Jersey*, 223 F.3d 220, 224 (3d Cir. 2000), uses the term "disciplined" to describe the adverse action element in the context where the employee was terminated.

The Fourth Circuit, in both *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 312 (4th Cir. 2008), and *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1019 (4th Cir. 1996), uses the term "disciplined" to describe the adverse action element. In both cases, the employee was terminated. *Firestone Fibers*, 515 F.3d at 311; *Chalmers*, 101 F.3d at 1017.

The Fifth Circuit uses either "discharged" or "disciplined" to describe the adverse action element. In *Weber v. Roadway Express, Inc.*, 199 F.3d 270, 273, 276 (5th Cir. 2000), where the employee was discharged, the court uses "discharged." In *Turpen v. Missouri-Kansas-Texas Railroad*, 736 F.2d 1022, 1024, 1026 (5th Cir. 1984), the employee was discharged and the court uses the term "disciplined."

The Tenth Circuit uses the term "fired" or "not hired" to describe the required "adverse action." In *Thomas v. National Ass'n of Letter Carriers*, 225 F.3d 1149, 1154-55 (10th Cir. 2000), where the employee was terminated, the court uses the term "fired" to describe the adverse action element. In *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1484, 1486 (10th Cir. 1989), the employer refused to hire the employee and the court uses the term "not hired" to describe the adverse action element.

The Eleventh Circuit states the adverse action standard as requiring discharge. *Morrissette-Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1321 (11th Cir. 2007); *Beadle v. Hillsborough County Sheriff's Dep't*, 29 F.3d 589, 592 n.5 (11th Cir. 1994). Although on the face of it the Eleventh Circuit's language is the most extreme, in both cases the employee was discharged and whether something less would suffice was not discussed.

C. Five circuits allow a showing of adverse action by something less than discharge or discipline.

The other circuits satisfy the third element of a prima facie case by something less (sometimes much less) than discharge or discipline.

For example, the Ninth Circuit allows a prima facie religious accommodation claim to be established by showing even a threat of an adverse employment action. *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004) (employee "discharged, threatened, or otherwise subjected . . . to an adverse employment action"). The threat can be implicit. *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 655 (9th Cir. 2006) ("the employer, at least implicitly, threatened some adverse action"). Far from requiring discharge or discipline, an employee need only face an implicit threat to meet the "adverse action" element in that circuit.

The Seventh Circuit, in *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1575 (7th Cir. 1997), states the standard as "discharge or other discriminatory treatment." Later, in *EEOC v. United Parcel Service*, 94 F.3d 314, 318 n.3 (7th Cir. 1996), the Seventh Circuit remarked that religious accommodation claims do not "fit comfortably into the ordinary Title VII dichotomy between 'disparate treatment' and 'disparate impact'" cases. Religious accommodation cases "ordinarily stem, as do 'disparate impact' cases, from the application of some neutral employment policy." *Id.*

Pointing out that this Court in *Hazelwood School District v. United States*, 433 U.S. 299, 307 (1977), allows a prima facie case of disparate impact to be

proven through statistical evidence without any individual proof of discrimination, the Seventh Circuit noted in *United Parcel Service* that "the employee, in the prima facie case, must show that the employer *consciously* failed to make an accommodation." 94 F.3d at 318, n.3. There the employee had neither been discharged nor disciplined. The employer refused to allow the employee to take a "public contact" position because (in accord with his religious beliefs) the employee refused to shave his beard. *Id.* at 315.

The First Circuit also broadly states the third element of a prima facie case. In *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 55 (1st Cir. 2002), it refers only to an "adverse employment decision." Although the First Circuit did not discuss its reasoning, a recent lower court decision on religious accommodation in the First Circuit interpreted the "adverse employment decision" requirement as much broader than discharge or discipline. It includes "tak[ing] something of consequence from the employee." *Brown v. F.L. Roberts & Co.*, 419 F. Supp. 2d 7, 13 (D. Mass. 2006).

The Second Circuit has explicitly rejected a "discharge" requirement. In *Philbrook v. Ansonia Board of Education*, 757 F.2d 476 (2d Cir. 1985), *aff'd & remanded on other grounds*, 479 U.S. 60, 67 (1986), the court noted that "[t]he district court placed much reliance on the fact that appellant was not forced into a choice between his job and his religious beliefs . . . ." *Id.* at 482. It also noted that other circuits "have stated that discharge was required to make a prima facie showing of discrimination." *Id.* at 483. However, the court determined that a "choice

here between giving up a portion of [the employee's] salary and his religious beliefs" was sufficient to meet the third element. *Id.* at 482-83.

In a later case, *Knight v. Connecticut Department of Public Health*, 275 F.3d 156, 163 (2d Cir. 2001), one employee seeking a religious accommodation (Quental) had simply been issued a letter of reprimand and told to stop promoting her religious beliefs on company time. The only defect in the employee's prima facie case identified by the court was failure to give notice of her religious beliefs, not a lack of discharge or discipline. *Id.* at 167-68.

In a very recent unpublished religious accommodation case, *Bowles v. New York City Transit Authority*, 285 Fed. Appx. 812, 814 (2d Cir. 2008), the Second Circuit quoted with approval the adverse action standard from its published decision in *Zelnik v. Fashion Institute of Technology*, 464 F.3d 217, 225 (2d Cir. 2006), which included "a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation."[1]

The Eighth Circuit's reading of the third element of a prima facie case requires only any "adverse employment action." *Cruzan v. Special Sch. Dist., No. 1*, 294 F.3d 981, 983 (8th Cir. 2002). This can include "a 'tangible change in duties or working conditions

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[1] *Zelnik*, a First-Amendment case, quotes *Galabya v. New York City Board of Education*, 202 F.3d 636 (2d Cir. 2000), an ADEA case. *Galabya* notes that the Second Circuit analyzes Title VII and ADEA cases under the same legal framework. *Id.* at 640 n.2.

that constitute [sic] a material employment disadvantage.'" *Id.* at 984 (citations omitted).

The district court and the majority of the panel below required discharge or discipline. That requirement conflicts with five circuits, but is consistent with language used by five others.

D. This case squarely presents the conflict among the circuits on adverse action.

Both the district court and Judge Batchelder's opinion highlight the fact that Reed did not bring a disparate treatment claim, thus suggesting a failure to properly raise the discriminatory aspect of the union's excessive fee. App. 71a (trial court); App. 11a (Batchelder). To the contrary, Mr. Reed consistently argued below that a "reasonable" accommodation could not be a "discriminatory" accommodation—which is precisely what this Court ruled in *Ansonia*, 479 U.S. at 71. Indeed, Reed's argument on this point is even quoted in the lower courts. App. 68a (trial court); App. 13a (appeals court).

An employee who objects on religious grounds to paying the union fee is requesting a religious accommodation. Such a request can never be considered a disparate treatment claim. However, having granted Mr. Reed an accommodation, the statute (§ 701(j)) requires that the accommodation be "reasonable," as did this Court in *Ansonia*, 479 U.S. at 71.

That the lower courts should even suggest that Reed might have won if he pled his case differently is remarkable. The Sixth Circuit reads *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), as requiring the showing of "adverse action" as an element of a prima facie case for disparate treatment.

Talley v. Bravo Pitino Rest., 61 F.3d 1241, 1246 (6th Cir. 1995). Thus, even if Mr. Reed had pled his case as a disparate treatment claim, the majority of the panel below would have rejected his claim.

Reed has properly argued his case as a "reasonable accommodation" case, and that charging him more than any other employee is not "reasonable." This brings the elements of a reasonable accommodation case unequivocally into focus here.

III. THE SIXTH CIRCUIT'S DECISION TO REQUIRE DISCHARGE OR DISCIPLINE IN A CASE AGAINST A LABOR UNION CONFLICTS WITH THIS COURT'S DIRECTIONS TO THE SIXTH CIRCUIT IN *WHITE V. BURLINGTON NORTHERN & SANTA FE RAILWAY*.

The Sixth Circuit recently found itself corrected by this Court in a parallel matter. In *White v. Burlington Northern & Santa Fe Railway*, 364 F.3d 789, 799 (6th Cir. 2004) (*en banc*), *aff'd*, 548 U.S. 53 (2006), the Sixth Circuit concluded that under Title VII the standard for "adverse action" should be applied uniformly across all Title VII claims, including those raising retaliation issues.

When this Court reviewed *White*, it rejected a "uniform" adverse action standard for all Title VII claims. It determined that in retaliation cases adverse action need not be "limited to discriminatory actions that affect the terms and conditions of employment." *Compare* 364 F.3d at 799 *with* 548 U.S. at 62-64. The result of this Court's correction is that, in a retaliation case, adverse action constitutes anything that "well might have 'dissuaded a reasonable worker from making or supporting a charge of

discrimination.'" *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. at 68 (citations omitted). That standard does not require discharge or discipline.

This Court based that distinction upon the fact that Section 704 of Title VII (42 U.S.C. §2000e-3(a)) (the part dealing with retaliation), merely prohibits an employer to "discriminate against," while Section 703 (42 U.S.C. § 2000e-2(a)(1)) (the part dealing with employer discrimination) prohibits discrimination "with respect to his compensation, terms, conditions, or privileges of employment." *See White*, 548 U.S. at 62, 67.

That same distinction applies to cases against labor unions. The majority on the Sixth Circuit panel below repeated the same error the circuit made in *White*. Like Section 704, Title VII's prohibition applicable to labor unions (Section 703(c)) (42 U.S.C. § 2000e-2(c)(1)) bars discrimination without adding the employment context, *i.e.*, without adding "with respect to . . . compensation, terms, and conditions of employment."

Claims against employers are rooted in the language of 42 U.S.C. § 2000e-2(a)(1) & (2), which includes terms such as "hire," "discharge," "compensation, terms, conditions, or privileges of employment," "employment opportunities," and "status as an employee." *See TWA v. Hardison*, 432 U.S. 63, 73 (1977). These terms "explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace." *White*, 548 U.S. at 62.

In contrast, claims against a union are based on statutory language that makes it an unlawful practice for a union to "exclude or to expel from its

membership, or otherwise to discriminate against, any individual because of his . . . religion," 42 U.S.C. § 2000e-2(c)(1), or to "cause or attempt to cause an employer to discriminate against an individual in violation of this section." 42 U.S.C. § 2000e-2(c)(3).

It is obvious why Congress made such a distinction. As Judge McKeague astutely pointed out below, unions have no power to discharge or discipline an employee. App. 19a. They have no authority to punish an employee with respect to compensation, terms, and conditions of employment.

Using the plain language of the statute as a guide, the "adverse action" standard for religious accommodation cases against a union should be no higher than the standard applied by this Court in retaliation cases: adverse action constitutes anything that "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination'." *White*, 548 U.S. at 68 (citations omitted). In the religious accommodation context, the standard should be, at least, anything that would likely dissuade a worker from following the dictates of religious conscience.

Even the majority below was uncomfortable with applying the employer standard to a labor union case, for it noted that "prima facie elements of a religious accommodation case do not always fit nicely into a case against a labor union." App. 8a. The dissent was blunt: "Add th[e] difference in statutory language to the practical reality that a 'discharge or discipline' requirement would essentially bar religious accommodation claims against unions, and it is clear that we should not impose the 'discharge or discipline' requirement in this context." App. 20a.

To require discharge or discipline (matters having to do with compensation, terms and conditions of employment) in a religious accommodation case against a labor union is at odds with this Court's logic in *White*.

IV. THE SIXTH CIRCUIT'S DECISION ON THE FEE AMOUNT CONFLICTS WITH DECISIONS OF THIS COURT.

A. The decision below conflicts with *Ansonia Board of Education v. Philbrook*.

Although *Ansonia* did not resolve the "adverse action" issue, this Court did determine that a reasonable religious accommodation cannot be a discriminatory accommodation. 479 U.S. at 71. The court below found that Mr. Reed was required to pay 22% more in compulsory fees as a religious objector than he would have to pay as an objecting member or non-member. App. 4a. Thus, Mr. Reed was required to pay more than anyone else in the bargaining unit to retain his employment. That higher payment arose for only one reason: Mr. Reed's religious beliefs. The dissent below found that this "accommodation should also be deemed unreasonable under *Ansonia*." App. 25a. Approving a union practice that charges religious objectors more than any other objector conflicts with *Ansonia*.

B. The decision below conflicts with *Communications Workers of America v. Beck*.

This Court has a "black letter" rule that no objecting employee in the United States can ever be compelled to pay for union politics. *Communications Workers of Am. v. Beck*, 487 U.S. 735 (1988) (private sector employees); *Ellis v. Bhd. of Ry. Clerks*, 466 U.S. 435 (1984) (railroad and airline employees);

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (public sector employees).

In *Beck*, this Court construed the "periodic dues and initiation fees" requirement of the National Labor Relations Acts ("NLRA"), 29 U.S.C. § 158, to mean that the *maximum* an objector is required to pay is "financial core" dues—the amount the union spends for bargaining, but not the amount spent on politics. 487 U.S. at 744-45, 751-53, 760-63.

Beck sets the benchmark for the maximum amount of union fees that can be extracted from an unwilling employee. It was not Congress' intent to compel employees to support union politics through their compulsory dues dollars. *Id.* at 755-59. Although Mr. Reed is not paying any money to the union, the statutory cap on the amount that can be compelled under the NLRA from unwilling employees should apply to the charity-substitute payment for religious objectors. The dissent below endorsed this argument: "If a union cannot charge an objecting nonmember more than the *Beck* amount . . . there is no basis for offering an accommodation in excess of that amount." App. 23a.

V. BOTH QUESTIONS PRESENTED ARE OF SIGNIFICANT IMPORTANCE TO THE ADMINISTRATION OF TITLE VII CLAIMS AND CONCERN FUNDAMENTAL RIGHTS.

A. The amount of the charity-substitution payment is an important question of first impression.

The concurring opinion below noted that "no circuit has squarely addressed the reasonableness of requiring that the substituted charitable contributions be equal to the full *amount* of the dues." App.

12a. Conditioning a citizen's means of employment on payments to a labor union, or any third party, is a subject that has repeatedly attracted the Court's attention in recent years. In the last thirty years, this Court has reviewed various aspects of compulsory union payments at least eight times.[2] For the state to compel an employee to pay money to a labor union, or even to a charity, raises First-Amendment issues. *Abood*, 431 U.S. at 231 (philosophical and social matters entitled to protection).

The two members of the Sixth Circuit panel who reached that issue split. *Compare* App. 12a *with* App. 24a. Below, the district court and the EEOC were also split, with the trial court disagreeing with the EEOC, which issued a favorable cause determination letter to Mr. Reed. *Compare* App. 69a *with* App. 73a.

In many respects, Title VII imports First-Amendment concepts into the workplace. Were this a First-Amendment claim, there would be little debate that freedom of religion and free speech are seriously compromised by a requirement that employees with certain religious views about supporting labor unions must pay more than any other objecting employee in the bargaining unit.

Compulsory union fees present a special circumstance in which this Court would not find a trivial violation. "The amount at stake for each individual

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[2] *Locke v. Karass*, _ U.S. _ , 129 S. Ct. 798 (2009); *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers of Am. v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Bhd. of Ry. Clerks*, 466 U.S. 435 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

dissenter does not diminish this concern. . . . Thomas Jefferson and James Madison [agreed] about the tyrannical character of forcing an individual to contribute even 'three pence' for the 'propagation of opinions which he disbelieves.'" *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305 (1986).

Mr. Reed is required, year after year, to pay 22% more than his co-workers must pay to retain their jobs. Because the union gets none of this charitable money, there is no countervailing argument in favor of charging employees of faith more—other than to punish religious objections or deter religious employees from asserting their rights under Title VII. Deterrence is self-evidently not a trivial matter.

No logic supports compelling Mr. Reed to pay 22% more to charity simply because the UAW spends 22% of its dues money to inform its members to vote for politicians favored by union leadership.

B. Requiring discharge or discipline could forever bar religious accommodation claims against unions because of statute of limitations problems.

This Court has long held that, in other Title VII contexts, the statute of limitations begins to run when a violation of Title VII is announced, and not when the effects of the violation are implemented. *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980). This Court recently reaffirmed the validity of *Ricks*. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 626 (2007).

If the Sixth Circuit is correct that Mr. Reed has no cause of action unless he is actually discharged (or disciplined), and, if the Sixth Circuit is right that threats of discrimination, announcements of the

discrimination or even the actual application of the discriminatory accommodation do not constitute adverse action, then Reed has absolutely no control over a timely filing of an EEOC charge. The statute of limitations would begin running as soon as the union announced that Mr. Reed must pay full dues to charity, but he could not then satisfy the Sixth Circuit's "discharge or discipline" requirement.

Even if Mr. Reed did not acquiesce in the discriminatory accommodation, and refused to make payment and therefore suffered discharge, he would have no control over the timing of the union's request for his discharge or the employer's decision when he should be discharged. A union could thwart all litigation over this issue by simply ensuring that he was discharged at least 300 days after it informed him that he would have to pay to charity more than anyone else was required to pay to remain employed. 42 U.S.C. § 2000e-5(e)(1).

Congress's decision to require a reasonable religious accommodation would be completely frustrated. Employees of faith would not only have to determine that they must suffer discharge to vindicate their statutory rights, they could not be sure that such dire action would assure the timely filing of an EEOC charge. There is absolutely no justification for such a result in either the statute or common sense. As the dissent here complained, if the Sixth Circuit's split opinion is allowed to stand, "The majority opinion does not—and I think cannot—explain what an employee placed in this position should do in order to appropriately assert his or her rights under Title VII." App. 22a.

C. The decision below could forever bar religious accommodation claims against unions because of the way compulsory union payments are extracted from employees.

The Ohio legislature, among legislatures of other populous states, allows the nonconsensual, automatic extraction of union fees from public employees' paychecks. Ohio Rev. Code Ann. § 4117.09(C). Consider the application of the Sixth Circuit standard if Mr. Reed were an Ohio public employee, where his union fees would be involuntarily extracted from his pay. If the union refused to accommodate him in any way, would he be able to show discharge or discipline?

If the Sixth Circuit correctly held that an employee must suffer discharge or discipline, what discharge or discipline has an employee suffered who has no control over the confiscation of union dues? An employee has no ability to satisfy the discharge or discipline element if the employee cannot refuse to pay—yet the violation of the employee's religious beliefs is complete upon the extraction of union fees contrary to the employee's sincere religious beliefs.

As recently as summer 2009, two cases were pending before the U.S. District Court in Columbus, Ohio, in which Ohio public school teachers who had union fees involuntarily taken from their pay claimed the right to a religious accommodation. The union defended that they were not entitled to an accommodation because they had not suffered discharge or discipline. *Bostelman v. Ohio Educ. Ass'n*, No. 2:08 cv930 (S.D. Ohio dismissed Sept. 29, 2009); *Hart v. Ohio Educ. Ass'n*, No. 2:08cv1141 (S.D. Ohio dismissed Sept. 29, 2009).

Ms. Bostelman is a public school teacher who is close to retirement. Should she have had to quit her teaching job to keep her conscience clear? And, if the Sixth Circuit majority is correct about what constitutes adverse action, would even quitting be sufficient to establish a prima facie case for religious accommodation?

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted to eliminate the conflict among the Circuits over what an employee of faith must prove to claim a religious accommodation, to bring the turmoil in the lower courts in line with the will of Congress, and to protect employees from having to choose between their God and their job. At the same time, the Court should settle the amount of the charity-substitution payment.

Respectfully submitted,

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APPENDIX

APPENDIX A

[569 F.3d 576]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEFFREY J. REED,
Plaintiff-Appellant,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Defendant-Appellee.

No. 07-2505

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 06-14233—SEAN F. COX, District Judge.

Argued: September 17, 2008
Decided and Filed: June 23, 2009

Before: GUY, BATCHELDER, and McKEAGUE, Circuit Judges.

BATCHELDER, J., delivered the opinion of the court. GUY, J. (pp. 10-11), delivered a separate concurring opinion. McKEAGUE, J. (pp. 12-21), delivered a separate dissenting opinion.

AMENDED OPINION

ALICE M. BATCHELDER, Circuit Judge. Plaintiff-Appellant Jeffrey Reed appeals the district court's order granting summary judgment in favor of Defendant-Appellee International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW"). Reed claims that UAW, in violation of Title VII of the Civil Rights Act of 1964, failed to provide a reasonable accommodation for his religious objection to financially supporting the union. Because Reed has failed to make out a prima facie religious accommodation case, we **AFFIRM**.

I. BACKGROUND

UAW represents the employees of automobile manufacturer AM General in Mishawaka, Indiana. The collective bargaining agreement between UAW and AM General includes a union security provision under which all AM General employees must either become UAW members or pay the union an agency fee equal to the amount of membership dues. The UAW Constitution grants both members and non-member agency fee payers "the right to object to the expenditure of a portion of his/her dues money for activities or causes primarily political in nature" and to receive a rebate for that portion. UAW and AM General also are parties to a letter agreement that allows any employee with a *bona fide* religious objection to joining or supporting a labor union to satisfy his union security obligation by making a payment equal to full membership dues to one of three charities mutually designated by UAW and AM General.

On May 20, 2002, AM General hired Reed to work at its Mishawaka facility, and Reed immediately became a UAW member. After reading UAW publications, Reed concluded that he could not financially support the union without violating his personal religious convictions. Reed terminated his UAW membership on October 18, 2004. UAW notified Reed that it would treat him as an objecting non-member and directed AM General to deduct from Reed's pay an agency fee consisting only of that portion of the union dues not used for political expenditures.

On February 10, 2005, Reed informed UAW that he had religious objections to supporting the union in any amount and asked to donate to Disabled American Veterans the reduced agency fee he had been paying UAW as an objecting non-member. On November 10, 2005, after receiving confirmation from Reed's pastor that Reed held *bona fide*, personal convictions against supporting the union, UAW granted Reed's request to be treated as a religious objector. UAW instructed Reed to pay $439.44, the amount of full union dues that had accrued since February 1, 2005,[1] to one of the three charities selected by UAW and AM General. UAW further explained that upon Reed's delivering to UAW a receipt showing full payment to an approved charity, the union would refund him $339.62, the amount he had paid in agency fees from February 2005 through November 2005. Reed paid $439.44 to Riley's Children Foundation, one of the designated charities, and UAW refunded him $339.62. This arrangement caused Reed to pay approximately $100 more to charity as a religious objector than he

[1] Although Reed's notice of his religious objection was dated February 10, 2005, UAW announced that it would consider his religious-objector status as beginning on February 1, 2005.

had paid to UAW in agency fees as an objecting non-member. Reed's ongoing union security obligation requires him to make a monthly charity payment approximately 22% greater than what he would pay UAW as an objecting member or non-member.

Reed filed this action on September 26, 2006, alleging that UAW failed reasonably to accommodate his religious objections to supporting the union. On October 19, 2007, the district court ruled on the parties' cross-motions for summary judgment and held that: (1) Reed had failed to establish his prima facie case because he had not shown that he had been discharged or disciplined; and (2) even if Reed had established a prima facie case, UAW's accommodation of Reed's religious objections was reasonable. Reed timely appealed that decision to this court.

II. STANDARD OF REVIEW

We review *de novo* a district court's grant of summary judgment, using the same standard applied by the district court. *Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999) (en banc). Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We must review all the evidence, facts, and inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

In order to defeat a summary judgment motion, the nonmoving party "must show sufficient evidence to create a genuine issue of material fact." *Prebilich-Holland v. Gaylord Entm't Co.*, 297 F.3d 438, 442 (6th Cir. 2002) (citing *Klepper v. First Am. Bank*,

916 F.2d 337, 342 (6th Cir. 1990)). The nonmoving party must provide more than a scintilla of evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). That is, the nonmoving party must present evidence sufficient to permit a reasonable jury to find in its favor. *Id.* Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir. 1996).

III. ANALYSIS

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for a labor organization . . . to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his . . . religion . . . ." 42 U.S.C. § 2000e-2(c). There are two basic types of religious discrimination claims that an individual may bring against a labor union under Title VII: disparate treatment claims and religious accommodation claims. In raising a disparate treatment claim, a plaintiff alleges that the union has treated him less favorably than similarly-situated applicants or members because of his religion. Here, Reed has not brought a disparate treatment claim. In fact, he has in his briefs before this court taken pains to emphasize that he has taken only the "accommodation path," a theory of recovery under which Reed asserts that the union has failed reasonably to accommodate a conflict between an employment requirement and his religious beliefs.

Title VII provides for religious accommodation claims in its definition of religion, which includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). This definition imposes upon employers a "statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship[.]" *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75 (1977). Although the definition mentions only employers, "courts have held that the duty to accommodate an employee's religious beliefs extends to unions as well as employers." *Wilson v. NLRB*, 920 F.2d 1282, 1286 (6th Cir. 1990); *see also EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 55 n.7 (1st Cir. 2002) ("[C]ourts have uniformly imposed upon labor organizations the same duty to provide reasonable accommodations.").

In this circuit, it is settled that "[t]he analysis of any religious accommodation case begins with the question of whether the employee has established a prima facie case of religious discrimination." *Tepper v. Potter*, 505 F.3d 508, 514 (6th Cir. 2007) (quoting *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987)). "To establish a prima facie case, [a plaintiff] must show that '(1) he holds a sincere religious belief that conflicts with an employment requirement; (2) he has informed the employer about the conflict; and (3) he was discharged or disciplined for failing to comply with the conflicting employment requirement.'" *Id.* "Once an employee has established a prima facie case, [the defendant] has the burden 'to show that it

could not reasonably accommodate the employee without undue hardship.'" *Id.* (quoting *Virts v. Consol. Freightways Corp.*, 285 F.3d 508, 516 (6th Cir. 2002)).

Reed's prima facie case failed, the district court held, because he had not presented sufficient evidence from which a jury could find that he had been discharged or disciplined. Reed contends that the district court was "confused about the elements of proof" The only disputed issue in the case, Reed argues, is whether he has been reasonably accommodated—not whether he should have been accommodated. Reed thus insists that he is not required to prove the elements of a prima facie religious discrimination case.

We have declined to relieve a religious accommodation plaintiff of his burden to establish a prima facie case, including the requirement that he demonstrate that he has been discharged or disciplined. *Goldmeier v. Allstate Ins. Co.*, 337 F.3d 629, 637 (6th Cir. 2003). Reed cannot avoid this requirement by insisting that the only controversy here concerns the reasonableness—not the necessity—of his accommodation. Unless a plaintiff has suffered some independent harm caused by a conflict between his employment obligation and his religion, a defendant has no duty to make any kind of accommodation. *See id.* Even Reed admits that "absent an accommodation requirement, he could not claim that he had a right to pay his union fees to charity." And although an employer or union may not dole out accommodations in a discriminatory fashion, *see Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 71 (1986), Reed explicitly has disavowed any disparate treatment claim.

Reed alternatively argues that he may satisfy the "discharge or discipline" element of the prima facie case by showing any adverse employment action.

Otherwise, Reed contends, a religious accommodation plaintiff could never establish a prima facie case against a labor union defendant, because a labor union cannot by itself discharge or discipline an employee. Reed contends that the amount he must pay to charity in excess of the amount other objectors pay to UAW "is effectively a reduction in his pay" and constitutes an adverse action.

True, the prima facie elements of a religious accommodation case do not always fit nicely into a case against a labor union. Just as a union cannot unilaterally discharge or discipline an employee, it cannot by itself impose an employment obligation.[2] We need not attempt here to specify the precise contours of a prima facie case against a labor union, however. Nor do we have to determine the broader question of whether "discharge or discipline" should be understood to include any adverse employment action. The dissent contends that "[t]his case is the first in our circuit to squarely present the question of whether a plaintiff can satisfy the prima facie case for a religious accommodation claim by showing an adverse employment action without showing discharge or discipline." Dissenting Op. at 15. But because we hold that the specific accommodation Reed challenges here does not rise to the level of an adverse employment action, we are not presented with the issue of whether a plaintiff can proceed on a showing of an employment action that is "adverse" but is not a form of "discharge or discipline." Other than the accommodation itself, the reasonableness of which he

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[2] Reed's lawsuit is against UAW only, although the charity payment requirement to which Reed objects is imposed under the terms of a letter agreement signed by both UAW and AM General.

challenges, Reed cannot point to any action by UAW that has adversely affected his employment. And whatever "discharge or discipline" or "adverse employment action" may mean in other contexts, a plaintiff does not carry his burden merely by showing that he has lost some amount of pay as a result of a proffered accommodation. *Tepper*, 505 F.3d at 514. Even under the standard the dissent proposes, the incremental adjustment to Reed's pay as a result of his charity-substitution payment is not actionable: It is not a *materially* adverse change in the terms or conditions of his employment. *See Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 885 (6th Cir. 1996).

In *Tepper*, we rejected a similar attempt to establish an identity between the challenged accommodation and the alleged injury. There, the plaintiff was a Messianic Jew who observed each Saturday as his Sabbath. *Id.* at 511. Although the post office for which Tepper worked followed a rotating schedule that allowed employees to take turns having Saturdays off, initially the staffing levels were sufficiently high for management to accommodate Tepper by giving him every Saturday off. *Id.* at 511-12. After staffing levels were reduced, this arrangement became difficult to sustain, and Tepper's supervisor informed him that his accommodation was being withdrawn. *Id.* at 512. The supervisor advised Tepper to reserve vacation time for Saturday absences, to use annual leave and unpaid leave, and to exchange days off with other employees. *Id.* at 512-13. Tepper argued that this alternative arrangement constituted a form of discipline because it forced him to take unpaid leave, reducing his annual pay and his pension. *Id.* at 513. We held, however, that "more than loss of pay is required to demonstrate discipline or discharge." *Id.* at 514.

Just as the plaintiff in *Tepper* could not point to any "discipline" other than the accommodation he claimed was unreasonable, Reed has suffered no discipline or adverse employment action other than the accommodation he claims is unreasonable—his required charity-substitution payment. The dissent contends that our reliance on *Tepper* is misplaced because in that case the employee was offered the option of taking unpaid leave so he could observe his Sabbath. Tepper's loss was different from Reed's, the dissent insists, because Tepper simply was not being paid for days he did not work. Dissenting Op. at 17. Even so, Tepper's accommodation required him to choose between violating his Sabbath by working his scheduled Saturdays, and observing his Sabbath but having limited opportunities to make up the lost hours and pay. Here, Reed's accommodation required him to choose between violating his religious beliefs by paying the agency fee—albeit the reduced agency fee —to the union, and honoring his religious beliefs by paying nothing to the union, but paying more out of pocket in order to satisfy his union security obligation. So in both *Tepper* and this case, the employee faced a choice of suffering either a monetary loss or a religious loss. Also of note, each plaintiff received a corresponding benefit unavailable to other employees: Tepper got every Saturday off, and Reed pays the union nothing while enjoying the benefits negotiated through collective bargaining.

The dissent contends that unless we are willing to treat a challenged accommodation as an adverse action, an employee can never prevail on a religious accommodation claim unless he is first discharged or disciplined: "If the employee accepts the accommodation, then, under the lead opinion's view, the employee has acquiesced in the discrimination and abandoned

any hope of a remedy." Dissenting Op. at 18. But an employee who believes that he is being treated less favorably because of his religion or some other protected ground has the right to bring a disparate treatment claim—a claim that Reed explicitly has disavowed.

IV. CONCLUSION

Because Reed has not shown any material adverse employment action, much less discharge or discipline, his religious accommodation claim fails. We therefore **AFFIRM** the district court's granting summary judgment in favor of UAW.

CONCURRENCE

RALPH B. GUY, JR., Circuit Judge, concurring. I write separately to clarify my reasons for affirming the decision granting summary judgment to the UAW with respect to Reed's Title VII religious accommodation claim. Although Reed has not made out a *prima facie* case, I agree with the district court that, even if he had, the UAW's accommodation requiring substitute payment of the full amount of dues to a charity constituted a reasonable and nondiscriminatory accommodation of Reed's religious beliefs.

Title VII's definition of "religion" makes it an unlawful employment practice not to make reasonable accommodation for the religious practices of employees unless it would cause undue hardship. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). An employee is entitled only to a reasonable accommodation, and, if reasonable, the defendant need not show that the employee's preferred accommodation would result in undue hardship. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67-68 (1986). The duty to accommodate an employee's religious beliefs extends to unions as well as employers. *Wilson v. NLRB*, 920 F.2d 1282, 1286 (6th Cir. 1990). Although several circuits have held that a union reasonably accommodates religious objectors by permitting the substitution of charitable contributions for union dues, no circuit has squarely addressed the reasonableness of requiring that the substituted charitable contributions be equal to the full *amount* of the dues. *See Wilson*, 920 F.2d at 1286; *Nottelson v. Smith Steel Workers D.A.L.U. 19806*, 643 F.2d 445, 451 (7th Cir. 1981); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1242 (9th Cir. 1981).

In addressing the question of reasonableness, the Court in *Ansonia* focused on whether the accommodation eliminated the conflict between the employment requirement and the employee's religious beliefs. 479 U.S. at 70. There, the specific accommodation—allowing the plaintiff to take unpaid leave to avoid working on Saturdays—eliminated the conflict between the employment requirement and religious practices and required him only to give up compensation for a day that he did not in fact work. *Id.* at 70-71. In this case, Reed concedes that allowing him to make substituted charitable contributions, even in the full amount of the dues, eliminated the conflict between the union security clause and his religious beliefs. Reed actually argues that the accommodation was not reasonable because it was discriminatory, relying on the caveat in *Ansonia* that "unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones." *Id.* at 71.

Reed insists that the relevant comparison is not with nonobjectors who pay the full amount of the dues, but with nonmember objectors (*Beck* objectors) who pay only that portion of dues expended on "core" representational activities (*i.e.*, 78.29% of the full dues). *See Communications Workers v. Beck*, 487 U.S. 735 (1988). In arguing that the difference is religious discrimination, Reed characterizes the comparison as being between "secular" and "religious" objectors. This is both misleading and inaccurate—as plaintiff's own situation demonstrates—since an employee may elect nonmember *Beck* status because the union's political activities conflict with his religious beliefs. The difference is based not on the employee's reasons for objecting, but rather on the nature of the respective objection, and different objections call for different accommodations. *See, e.g., EEOC v. Univ. of Detroit*,

904 F.2d 331, 335 (6th Cir. 1990). Nor is Reed persuasive in arguing that only religious objectors are *compelled* to pay an amount equal to the full dues because any nonobjecting member can choose to leave the union and assert *Beck* objector status. That is to say nothing more than that an employee cannot be compelled *if* he is a *Beck* objector. Since the accommodation provided plaintiff in this case was reasonable, the district court did not err in granting summary judgment to the UAW with respect to Reed's religious accommodation claim.

DISSENT

McKEAGUE, Circuit Judge, dissenting. The majority opinion affirms based on Reed's failure to demonstrate either discharge or discipline as part of his prima facie case against his union—a union, it is worth noting, that does not have the power to discharge or to discipline. I do not think either Title VII or our past holdings requires such a showing. An adverse employment action should be all that is required to establish a prima facie case for a religious accommodation claim, and certainly no more than that should be required in a claim against a union. The UAW required Reed to pay more dues because of the religious nature of his objection to the union, and this increased payment was an adverse employment action. I would therefore hold that the increased payment was sufficient to establish the final element of Reed's prima facie case.

I also disagree with the concurring opinion's analysis of the reasonableness of the accommodation. Because I do not agree with either ground offered for affirming the district court's judgment, I respectfully dissent.

I.

Religious accommodation claims against employers arise under the same statutory provisions as other Title VII religions discrimination claims. Title VII makes it an unlawful employment practice to "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1). Religion "includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). "The intent and effect of this definition was to make it an unlawful employment practice under § 703(a)(1) [42 U.S.C. § 2000e-2(a)(1)] for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *TWA v. Hardison*, 432 U.S. 63, 74 (1977). Section 2000e-2(a)(1) also provides the basis for religious disparate treatment claims. *See Tepper v. Potter*, 505 F.3d 508, 515 (6th Cir. 2007).

Despite the single statutory source for Title VII religious discrimination claims, our past decisions have incorrectly suggested a different level of harm is required to establish a prima facie disparate treatment claim based on religion than is required to establish a prima facie religious accommodation claim. A disparate treatment claim requires the employee show, among other things, "that he experienced an adverse employment action." *Tepper*, 505 F.3d at 515. An adverse

employment action is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761 (1998). A religious accommodation claim, meanwhile, appears to require a plaintiff to make a higher showing that "he was discharged or disciplined for failing to comply with the conflicting employment requirement." *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987).

This distinction between the amount of harm required under a disparate treatment theory and under a religious accommodation theory is not required by the statute. *See* 42 U.S.C. § 2000e-2(a)(1). It is also not required by our past holdings, though it is true that our religious accommodation precedents do use the "discharge or discipline" language. That is not surprising, because those decisions invoking the third element of the religious accommodation prima facie case almost invariably involve discharged employees. *See Virts v. Consol. Freightways Corp. of Delaware*, 285 F.3d 508, 515 (6th Cir. 2002) (discharged employee); *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 623 (6th Cir. 2000) (discharged employee); *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1378 (6th Cir. 1994) (discharged employee); *McGuire v. Gen. Motors Corp.*, 956 F.2d 607, 609 (6th Cir. 1992); *Smith*, 827 F.2d at 1084 (discharged employee). These cases therefore did not need to address whether a claim could survive without showing that the plaintiff had been discharged.

Our two most recent religious accommodation cases illustrate only that the prima facie case cannot be satisfied without showing some adverse employment

action. In *Tepper*, we found that the plaintiff had failed to establish the prima facie case because the only action taken against him was that his employer required Tepper to use unpaid leave for his observance of the Sabbath. 505 F.3d at 514. We noted that this not only failed to establish the prima facie case for religious accommodation, it failed to establish any adverse action at all. *See id.* at 516. Similarly, in *Goldmeier v. Allstate Ins. Co.*, the plaintiffs quit their jobs before experiencing any adverse effect from their employer's failure to accommodate their religious beliefs. 337 F.3d 629, 633 (6th Cir. 2003). *Tepper* and *Goldmeier* therefore both involve plaintiffs that have not shown any adverse action, much less either discharge or discipline. They do not address whether a claim could succeed upon a showing of an adverse employment action other than discharge or discipline.

Other circuits have stated that an adverse employment action short of discharge or discipline is sufficient to establish the prima facie case for religious accommodation. *See Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004); *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 55 (1st Cir. 2002); *EEOC v. United Parcel Serv.*, 94 F.3d 314, 317 (7th Cir. 1996); *see also Bowles v. New York City Transit Auth.*, 285 F. App'x 812, 813 (2d Cir. 2008); *Ali v. Alamo Rent-A-Car, Inc.*, 8 F. App'x 156, 158-59 (4th Cir. 2001). Indeed, I can find no decision in any circuit in which an appellate court found a plaintiff failed to establish a prima facie case where the plaintiff had demonstrated a materially adverse employment action.

Moreover, our precedents allude to the sufficiency of an adverse employment action in religious accom-

modation claims. In *Goldmeier*, we rejected the appellants' argument that they need not show any harm in order to satisfy the prima facie case: "neither this court, nor any of its sister circuits with substantively parallel religious discrimination jurisprudence, has ever endorsed the Goldmeiers' conclusion that no adverse employment action need be shown to sustain a prima facie case." 337 F.3d at 637. In *Tepper*, this court equated the "discharge or discipline" element of the religious accommodation prima facie case with the "materially adverse employment action" requirement of a disparate treatment claim. 505 F.3d at 516.

This case is the first in our circuit to squarely present the question of whether a plaintiff can satisfy the prima facie case for a religious accommodation claim by showing an adverse employment action without showing discharge or discipline. I would hold that a plaintiff should be able to succeed on such a showing. While discharge or discipline (assuming it is sufficiently severe) will always constitute a materially adverse employment action, there is no legal or logical reason why a plaintiff who suffers a materially adverse employment action must also show discharge or discipline.

II.

Further, even assuming that our precedents compel this court to require a showing of discharge or discipline in a religious accommodation suit against an employer, there is no reason to extend that requirement to claims brought against unions. As the majority opinion acknowledges, "the prima facie elements of a religious accommodation case do not always fit nicely into a case against a labor union." There is a reason they do not fit nicely: the artificially high standard that we have previously suggested for

a prima facie case against an employer simply can never be met in a claim against a union. As a union can neither discharge nor discipline an employee, applying the "discharge or discipline" element in claims against unions would foreclose all such claims. The majority opinion attempts to avoid this result by simply noting that there is no adverse employment action in this case. As I discuss below, I think it is clear that Reed did suffer an adverse employment action. Even putting that to the side, however, I cannot see how we can avoid entirely the question of what level of harm a plaintiff must show in a claim against a union. We cannot hold that Reed failed to meet the prima facie case without any indication of what that prima facie case is.

Indeed, Title VII itself suggests there may be a difference between claims against employers and claims against unions. A religious accommodation claim against employers is rooted in 42 U.S.C. § 2000e-2(a)(1). *See Hardison*, 432 U.S. at 73. The Supreme Court has held that the language of that section—"'hire,' 'discharge,' 'compensation, terms, conditions, or privileges of employment,' 'employment opportunities,' and 'status as an employee'—explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace." *Burlington N and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62 (2006). The same language does not exist in Title VII's union provision. Instead, it is an unlawful practice for a union to "exclude or . . . expel from its membership, or otherwise to discriminate against, any individual because of his . . . religion," *id.* § 2000e-2(c)(1), or to "cause or attempt to cause an employer to discriminate against an individual in violation of this section." *Id.* § 2000e-2(c)(3). Notably, the phrase "otherwise discriminate against" is similar

to that in Title VII's retaliation provision, which the Supreme Court has held is more expansive than the language in the provision giving rise to disparate treatment claims. *See Burlington*, 548 U.S. at 63-64.

Thus, even if this case does not provide an opportunity to clarify exactly what standard should apply in religious accommodation claims against unions (which I submit it does), the difference in statutory language should at least give us pause before we extend the "discharge or discipline" requirement to claims against unions. Add this difference in statutory language to the practical reality that a "discharge or discipline" requirement would essentially bar religious accommodation claims against unions, and it is clear that we should not impose the "discharge or discipline" requirement in this context.

III.

As discussed above, I believe that a materially adverse employment action is the appropriate standard for all religious accommodation claims. Reed satisfied that standard. The UAW required Reed to make larger payments than secular objectors. This disparity constitutes an adverse employment action. Under Title VII, an employment action must amount to "a materially adverse change" in the terms or conditions of employment to be actionable. *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 885 (6th Cir. 1996); *see also Mitchell v. Vanderbilt Univ.*, 389 F.3d 177, 182 (6th Cir. 2004). Notably, the Supreme Court stated that such an action will "in most cases inflict[] direct economic harm." *Ellerth*, 524 U.S. at 762. The economic effect does not have to be large in order to be an adverse employment action. *See White v. Burlington Northern & Santa Fe R. Co.*, 364 F.3d 789,

794, 802 (6th Cir. 2004) (en banc). A differential in pay establishes an adverse employment action. *Fuhr v. School Dist. of City of Hazel Park*, 364 F.3d 753, 758 (6th Cir. 2004).

The UAW required that Reed donate the full amount of union dues to charity rather than the lower amount political objectors must pay the union. If Reed had a secular objection to the union, the amount Reed would have to pay would decrease. This is a direct economic effect that resulted in Reed receiving less net income. As such, the ongoing higher payment the union requires of religious objectors constitutes an adverse employment action.

IV.

The majority opinion seeks to minimize the significance of this economic burden by relying on *Tepper*. Yet *Tepper* presented a significantly different set of facts. In *Tepper*, the plaintiff sought days off to observe religious holidays. 505 F.3d at 512. His employer originally accommodated him, but later rescinded the accommodation. *Id.* His employer continued to permit the plaintiff to use unpaid leave for all of his holidays. *Id.* The plaintiff alleged that using unpaid leave decreased his pay. *Id.* We dismissed this argument, noting that "[t]he Supreme Court has stated that 'the direct effect of unpaid leave is merely a loss of income for the period the employee is not at work; such an exclusion has no direct effect upon either employment opportunities or job status.'" *Id.* at 514. We then concluded that "Tepper is simply not being paid for the time he does not work." *Id.* The same cannot be said for Reed.

Nor am I persuaded that the fact the adverse employment action in this case occurs as part of an

accommodation should alter the analysis of the prima facie case. There is no indication in our case law that the prima facie case is limited in this way. In *Tepper*, for example, we found that the prima facie case was not satisfied because the accommodation did not harm the plaintiff—not because the harm to the plaintiff was part of an accommodation. *See* 505 F.3d at 514.

Moreover, the majority opinion's arbitrary distinction between employer/union practices that "count" for the prima facie religious accommodation case and those that do not places religious employees in an unavoidable bind. If an employer or union offers the employee an accommodation that adversely affects the terms and conditions of his or her employment, the employee can do nothing but lose. If the employee accepts the accommodation, then, under the majority opinion's view, the employee has acquiesced in the discrimination and abandoned any hope of a remedy. Meanwhile, if an employee rejects the accommodation, the employee not only puts his or her employment in jeopardy, the employee also runs afoul of the Supreme Court's instruction that the employer, not the employee, chooses the accommodation. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67-69 (1986). The majority opinion does not—and I think cannot—explain what an employee placed in this position should do in order to appropriately assert his or her rights under Title VII.

V.

I also find the concurring opinion unpersuasive in its analysis of the reasonableness of the accommodation at issue here. Unlike the concurring opinion, I do not think it is enough to say that Reed's objection is different from other accommodated objectors. Though

this is undoubtedly true, it does not explain why the accommodation is reasonable.

While the union does not have to use the accommodation proffered by the employee, the union must offer a *reasonable* accommodation. *See E.E.O.C. v. Univ. of Detroit*, 904 F.2d 331, 334 (6th Cir. 1990). I would find the accommodation here unreasonable for two reasons: the union cannot require a payment of this size from a nonmember, and the accommodation is discriminatory.

The Supreme Court has held that unions may exact from objecting nonmembers "only those fees and dues necessary to performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." *Commc'n Workers of Am. v. Beck*, 487 U.S. 735, 762-63 (1988) (internal quotation marks and citation omitted). Based on this, the Sixth Circuit has observed that *Beck* "limit[ed] the amount of dues a union can charge a non-union member." *United Food and Commercial Workers Local 951 v. Mulder*, 31 F.3d 365, 367 (6th Cir. 1994). If a union cannot charge an objecting nonmember more than the *Beck* amount, it seems to me that there is no basis for offering an accommodation in excess of that amount. As Reed is an objecting nonmember, it seems to me that a reasonable accommodation should be based on the amount that the union can require from objecting nonmembers under *Beck*.[1]

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[1] Although Reed did not articulate the argument in quite this fashion, he did raise a functionally identical argument in his briefs. Rather than phrasing the argument in terms of the amount the union can require him to pay, he argued that *Beck* gave objectors the right to choose not to pay the portion of union dues used for political purposes.

In this regard, I find persuasive the district court opinion in *O'Brien v. City of Springfield*. Relying on a state statute and a state regulation that provided a rule similar to the rule established in *Beck*,[2] a Massachusetts district court held that requiring a donation equal to full union dues was "*a per se* unreasonable accommodation." 319 F. Supp. 2d 90, 107 (D. Mass. 2003). It further explained that a union "is not entitled to charge whatever amount it wishes to someone making a charitable substitution." *Id.* at 106. The same reasoning should apply under *Beck*. The union should not be able to require objecting nonmembers to pay any more than *Beck* permits.[3] As

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[2] The union notes that, unlike under *Beck*, the Massachusetts law does not permit unions to charge any nonmembers more than the agency service fee. *See* Mass. Gen. Laws ch. 150E, § 12; Mass. Regs. Code tit. 456, § 17.04. For the reasons given below in footnote 3, I do not think this distinction alters the analysis of the reasonableness of the accommodation in this case.

[3] The union argues that, because nonmembers who do not object can be required to pay the full amount, the relevant benchmark should be the full dues amount. However, there is absolutely no dispute here that Reed has made his objections known to the union. Therefore, the relevant amount should be the *Beck* amount, not the full dues amount. So long as an objector makes his or her objection known, the union *cannot* charge the full dues amount under *Beck*. *See Beck*, 487 U.S. at 762-63; *Int'l Assoc. of Machinists v. Street*, 367 U.S. 740, 774 (1961). What the union can charge other employees should therefore be irrelevant in determining the accommodation for Reed. Rather, the relevant standard should be based on the status of the employee in question. It would likewise be fruitless for an employer to argue that, when reviewing the termination of a for-cause employee, the court should consider that an employer can fire an at-will employee for any reason. Instead, what matters is the for-cause status of the employee in question. Similarly, the union should not point to the dues it can require other

Reed is an objecting nonmember, I would find that the union's attempt to force Reed to donate the full union dues amount rather than the amount paid by *Beck* objectors is unreasonable.

Further, the accommodation is discriminatory. The union admits that it prefers the elevated amount because "this arrangement does not create any financial incentive for employees to claim religious objection in order to reduce their financial obligations." Response Br. at 32. The value of the higher amount is precisely its deterrence of other members and nonmembers from asserting their religious objections. The union offers no other reason for requiring the elevated payments, and I cannot think of a non-discriminatory reason for requiring religious objectors such as Reed to pay more in order to accommodate their objections. I would therefore find the amount the union requires Reed to pay is discriminatory. As such, the accommodation should also be deemed unreasonable under *Ansonia Board of Education v. Philbrook*. See 479 U.S. 60, 71 (1986) ("Such an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness.").

VI.

There is no question that the only way Reed could avoid the conflict between his religious beliefs and the UAW's requirements was through a payment greater than that required of other objectors. I would find this sufficient to establish the third prong of the prima facie case for religious accommodation. I also would find the accommodation offered by the union

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employees to pay; what matters is the amount it could otherwise require Reed to pay.

unreasonable because the union lacks the authority to require such a large payment and the accommodation discriminates against religious objectors. Accordingly, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed June 23, 2009]

No. 07-2505

JEFFREY J. REED,
Plaintiff-Appellant,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Defendant-Appellee.

Before: GUY, BATCHELDER, and McKEAGUE, Circuit Judges.

AMENDED JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court granting summary judgment in favor of defendant International Union, United Automobile, Aerospace and Agricultural Implement Workers of America is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

APPENDIX C

[564 F.3d 781]

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JEFFREY J. REED,
Plaintiff-Appellant,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Defendant-Appellee.

No. 07-2505

Appeal from the United States District Court for the Eastern District of Michigan at Detroit
No. 06-14233—Sean F. Cox, District Judge

Argued: September 17, 2008
Decided and Filed: May 7, 2009

Before: GUY, BATCHELDER, and McKEAGUE, Circuit Judges.

BATCHELDER, J., delivered the opinion of the court. GUY, J. (pp. 10-11), delivered a separate opinion concurring in the result. McKEAGUE, J. (pp. 12-20), delivered a separate dissenting opinion.

OPINION

ALICE M. BATCHELDER, Circuit Judge. Plaintiff-Appellant Jeffrey Reed appeals the district court's order granting summary judgment in favor of Defendant-Appellee International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW"). Reed claims that UAW, in violation of Title VII of the Civil Rights Act of 1964, failed to provide a reasonable accommodation for his religious objection to financially supporting the union. Because Reed has failed to make out a prima facie case of religious discrimination, we **AFFIRM**.

I. BACKGROUND

UAW represents the employees of automobile manufacturer AM General in Mishawaka, Indiana. The collective bargaining agreement between UAW and AM General includes a union security provision under which all AM General employees must either become UAW members or pay the union an agency fee equal to the amount of membership dues. The UAW Constitution grants both members and non-member agency fee payers "the right to object to the expenditure of a portion of his/her dues money for activities or causes primarily political in nature" and to receive a rebate for that portion. UAW and AM General also are parties to a letter agreement that allows any employee with a *bona fide* religious objection to joining or supporting a labor union to satisfy his union security obligation by making a payment equal to full membership dues to one of three charities mutually designated by UAW and AM General.

On May 20, 2002, AM General hired Reed to work at its Mishawaka facility, and Reed immediately became a UAW member. After reading UAW publications, Reed concluded that he could not financially support the union without violating his personal religious convictions. Reed terminated his UAW membership on October 18, 2004. UAW notified Reed that it would treat him as an objecting non-member and directed AM General to deduct from Reed's pay an agency fee consisting only of that portion of the union dues not used for political expenditures.

On February 10, 2005, Reed informed UAW that he had religious objections to supporting the union in any amount and asked to donate to Disabled American Veterans the reduced agency fee he had been paying UAW as an objecting non-member. On November 10, 2005, after receiving confirmation from Reed's pastor that Reed held *bona fide*, personal convictions against supporting the union, UAW granted Reed's request to be treated as a religious objector. UAW instructed Reed to pay $439.44, the amount of full union dues that had accrued since February 1, 2005,[1] to one of the three charities selected by UAW and AM General. UAW further explained that upon Reed's delivering to UAW a receipt showing full payment to an approved charity, the union would refund him $339.62, the amount he had paid in agency fees from February 2005 through November 2005. Reed paid $439.44 to Riley's Children Foundation, one of the designated charities, and UAW refunded him $339.62. This arrangement caused Reed to pay approximately $100 more to charity as a religious

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[1] Although Reed's notice of his religious objection was dated February 10, 2005, UAW announced that it would consider his religious-objector status as beginning on February 1, 2005.

objector than he had paid to UAW in agency fees as an objecting non-member. Reed's ongoing union security obligation requires him to make a monthly charity payment approximately 22% greater than what he would pay UAW as an objecting member or non-member.

Reed filed this action on September 26, 2006, alleging that UAW failed reasonably to accommodate his religious objections to supporting the union. On October 19, 2007, the district court ruled on the parties' cross-motions for summary judgment and held that: (1) Reed had failed to establish his prima facie case because he had not shown that he had been discharged or disciplined; and (2) even if Reed had established a prima facie case, UAW's accommodation of Reed's religious objections was reasonable. Reed timely appealed that decision to this court.

II. STANDARD OF REVIEW

We review *de novo* a district court's grant of summary judgment, using the same standard applied by the district court. *Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999) (en banc). Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We must review all the evidence, facts, and inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

In order to defeat a summary judgment motion, the nonmoving party "must show sufficient evidence to create a genuine issue of material fact." *Prebilich-*

Holland v. Gaylord Entm't Co., 297 F.3d 438, 442 (6th Cir. 2002) (citing *Klepper v. First Am. Bank*, 916 F.2d 337, 342 (6th Cir. 1990)). The nonmoving party must provide more than a scintilla of evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). That is, the nonmoving party must present evidence sufficient to permit a reasonable jury to find in its favor. *Id.* Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir. 1996).

III. ANALYSIS

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for a labor organization . . . to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his . . . religion . . . 42 U.S.C. § 2000e-2(c). There are two basic types of religious discrimination claims that an individual may bring against a labor union under Title VII: disparate treatment claims and religious accommodation claims. In raising a disparate treatment claim, a plaintiff alleges that the union has treated him less favorably than similarly-situated applicants or members because of his religion. Here, Reed has not brought a disparate treatment claim. In fact, he has in his briefs before this court taken pains to emphasize that he has taken only the "accommodation path," a theory of recovery under which Reed asserts that the union has failed reasonably to accommodate a conflict between an employment requirement and his religious beliefs.

Title VII provides for religious accommodation claims in its definition of religion, which includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). This definition imposes upon employers a "statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship[.]" *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75 (1977). Although the definition mentions only employers, "courts have held that the duty to accommodate an employee's religious beliefs extends to unions as well as employers." *Wilson v. NLRB*, 920 F.2d 1282, 1286 (6th Cir. 1990); *see also EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 55 n.7 (1st Cir. 2002) ("[C]ourts have uniformly imposed upon labor organizations the same duty to provide reasonable accommodations.").

In this circuit, it is settled that "[t]he analysis of any religious accommodation case begins with the question of whether the employee has established a prima facie case of religious discrimination." *Tepper v. Potter*, 505 F.3d 508, 514 (6th Cir. 2007) (quoting *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987)). "To establish a prima facie case, [a plaintiff] must show that '(1) he holds a sincere religious belief that conflicts with an employment requirement; (2) he has informed the employer about the conflict; and (3) he was discharged or disciplined for failing to comply with the conflicting employment requirement.'" *Id.* "Once an employee has established a prima facie case, [the defendant] has the burden 'to

show that it could not reasonably accommodate the employee without undue hardship.'" *Id.* (quoting *Virts v. Consol. Freightways Corp.*, 285 F.3d 508, 516 (6th Cir. 2002)).

Reed's prima facie case failed, the district court held, because he had not presented sufficient evidence from which a jury could find that he had been discharged or disciplined. Reed contends that the district court was "confused about the elements of proof." The only disputed issue in the case, Reed argues, is whether he has been reasonably accommodated—not whether he should have been accommodated. Reed thus insists that he is not required to prove the elements of a prima facie religious discrimination case.

We have declined to relieve a religious accommodation plaintiff of his burden to establish a prima facie case, including the requirement that he demonstrate that he has been discharged or disciplined. *Goldmeier v. Allstate Ins. Co.*, 337 F.3d 629, 637 (6th Cir. 2003). Reed cannot avoid this requirement by insisting that the only controversy here concerns the reasonableness—not the necessity—of his accommodation. Unless a plaintiff has suffered some independent harm caused by a conflict between his employment obligation and his religion, a defendant has no duty to make any kind of accommodation. *See id.* Even Reed admits that "absent an accommodation requirement, he could not claim that he had a right to pay his union fees to charity." And although an employer or union may not dole out accommodations in a discriminatory fashion, *see Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 71 (1986), Reed explicitly has disavowed any disparate treatment claim.

Reed alternatively argues that he may satisfy the "discharge or discipline" element of the prima facie case by showing any adverse employment action. Otherwise, Reed contends, a religious accommodation plaintiff could never establish a prima facie case against a labor union defendant, because a labor union cannot by itself discharge or discipline an employee. Reed contends that the amount he must pay to charity in excess of the amount other objectors pay to UAW "is effectively a reduction in his pay" and constitutes an adverse action.

True, the prima facie elements of a religious accommodation case do not always fit nicely into a case against a labor union. Just as a union cannot unilaterally discharge or discipline an employee, it cannot by itself impose an employment obligation.[2] We need not attempt here to specify the precise contours of a prima facie case against a labor union, however. Nor do we have to determine the broader question of whether "discharge or discipline" should be understood to include any adverse employment action. The dissent contends that "[t]his case is the first in our circuit to squarely present the question of whether a plaintiff can satisfy the prima facie case for a religious accommodation claim by showing an adverse employment action without showing discharge or discipline." Dissenting Op. at 15. But because we hold that the specific accommodation Reed challenges here does not rise to the level of an adverse employment action, we are not presented with the issue of whether a plaintiff can proceed on a showing of an

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[2] Reed's lawsuit is against UAW only, although the charity payment requirement to which Reed objects is imposed under the terms of a letter agreement signed by both UAW and AM General.

employment action that is "adverse" but is not a form of "discharge or discipline." Other than the accommodation itself, the reasonableness of which he challenges, Reed cannot point to any action by UAW that has adversely affected his employment. And whatever "discharge or discipline" or "adverse employment action" may mean in other contexts, a plaintiff does not carry his burden merely by showing that he has lost some amount of pay as a result of a proffered accommodation. *Tepper*, 505 F.3d at 514. Even under the standard the dissent proposes, the incremental adjustment to Reed's pay as a result of his charity-substitution payment is not actionable: It is not a *materially* adverse change in the terms or conditions of his employment. *See Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 885 (6th Cir. 1996).

In *Tepper*, we rejected a similar attempt to establish an identity between the challenged accommodation and the alleged injury. There, the plaintiff was a Messianic Jew who observed each Saturday as his Sabbath. *Id.* at 511. Although the post office for which *Tepper* worked followed a rotating schedule that allowed employees to take turns having Saturdays off, initially the staffing levels were sufficiently high for management to accommodate *Tepper* by giving him every Saturday off. *Id.* at 511-12. After staffing levels were reduced, this arrangement became difficult to sustain, and Tepper's supervisor informed him that his accommodation was being withdrawn. *Id.* at 512. The supervisor advised Tepper to reserve vacation time for Saturday absences, to use annual leave and unpaid leave, and to exchange days off with other employees. *Id.* at 512-13. Tepper argued that this alternative arrangement constituted a form of discipline because it forced him to take unpaid leave, reducing his annual pay and his pension.

Id. at 513. We held, however, that "more than loss of pay is required to demonstrate discipline or discharge." *Id.* at 514.

Just as the plaintiff in *Tepper* could not point to any "discipline" other than the accommodation he claimed was unreasonable, Reed has suffered no discipline or adverse employment action other than the accommodation he claims is unreasonable—his required charity-substitution payment. The dissent contends that our reliance on *Tepper* is misplaced because in that case the employee was offered the option of taking unpaid leave so he could observe his Sabbath. Tepper's loss was different from Reed's, the dissent insists, because Tepper simply was not being paid for days he did not work. Dissenting Op. at 17. Even so, Tepper's accommodation required him to choose between violating his Sabbath by working his scheduled Saturdays, and observing his Sabbath but having limited opportunities to make up the lost hours and pay. Here, Reed's accommodation required him to choose between violating his religious beliefs by paying the agency fee—albeit the reduced agency fee—to the union, and honoring his religious beliefs by paying nothing to the union, but paying more out of pocket in order to satisfy his union security obligation. So in both *Tepper* and this case, the employee faced a choice of suffering either a monetary loss or a religious loss. Also of note, each plaintiff received a corresponding benefit unavailable to other employees: Tepper got every Saturday off, and Reed pays the union nothing while enjoying the benefits negotiated through collective bargaining.

The dissent contends that unless we are willing to treat a challenged accommodation as an adverse action, an employee can never prevail on a religious

accommodation claim unless he is first discharged or disciplined: "If the employee accepts the accommodation, then, under the lead opinion's view, the employee has acquiesced in the discrimination and abandoned any hope of a remedy." Dissenting Op. at 18. But an employee who believes that he is being treated less favorably because of his religion or some other protected ground has the right to bring a disparate treatment claim—a claim that Reed explicitly has disavowed.

IV. CONCLUSION

Because Reed has not shown any material adverse employment action, much less discharge or discipline, his religious accommodation claim fails. We therefore **AFFIRM** the district court's granting summary judgment in favor of UAW.

CONCURRING IN THE RESULT

RALPH B. GUY, JR., Circuit Judge, concurring. I concur in the result and write separately to clarify my reasons for affirming the decision granting summary judgment to the UAW with respect to Reed's Title VII religious accommodation claim. Apart from the questions raised concerning an appropriate *prima facie* test for such a claim by the lead and dissenting opinions in this case, I agree with the district court that the UAW's accommodation requiring substitute payment of the full amount of dues to a charity constituted a reasonable and nondiscriminatory accommodation of plaintiff's religious beliefs.

Title VII's definition of "religion" makes it an unlawful employment practice not to make reasonable accommodation for the religious practices of employees unless it would cause undue hardship. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). An employee is entitled only to a reasonable accommodation, and, if reasonable, the defendant need not show that the employee's preferred accommodation would result in undue hardship. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67-68 (1986). The duty to accommodate an employee's religious beliefs extends to unions as well as employers. *Wilson v. NLRB*, 920 F.2d 1282, 1286 (6th Cir. 1990). Although several circuits have held that a union reasonably accommodates religious objectors by permitting the substitution of charitable contributions for union dues, no circuit has squarely addressed the reasonableness of requiring that the substituted charitable contributions be equal to the full *amount* of the dues.

See Wilson, 920 F.2d at 1286; *Nottelson v. Smith Steel Workers D.A.L.U. 19806*, 643 F.2d 445, 451 (7th Cir. 1981); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1242 (9th Cir. 1981).

In addressing the question of reasonableness, the Court in *Ansonia* focused on whether the accommodation eliminated the conflict between the employment requirement and the employee's religious beliefs. 479 U.S. at 70. There, the specific accommodation—allowing the plaintiff to take unpaid leave to avoid working on Saturdays—eliminated the conflict between the employment requirement and religious practices and required him only to give up compensation for a day that he did not in fact work. *Id.* at 70-71. In this case, Reed concedes that allowing him to make substituted charitable contributions, even in the full amount of the dues, eliminated the conflict between the union security clause and his religious beliefs. Reed actually argues that the accommodation was not reasonable because it was discriminatory, relying on the caveat in *Ansonia* that "unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones." *Id.* at 71.

Reed insists that the relevant comparison is not with nonobjectors who pay the full amount of the dues, but with nonmember objectors (*Beck* objectors) who pay only that portion of dues expended on "core" representational activities (*i.e.*, 78.29% of the full dues). *See Communications Workers v. Beck*, 487 U.S. 735 (1988). In arguing that the difference is religious discrimination, Reed characterizes the comparison as being between "secular" and "religious" objectors. This is both misleading and inaccurate—as plaintiff's own situation demonstrates—since an employee may

elect nonmember *Beck* status because the union's political activities conflict with his religious beliefs. The difference is based not on the employee's reasons for objecting, but rather on the nature of the respective objection, and different objections call for different accommodations. *See, e.g., EEOC v. Univ. of Detroit*, 904 F.2d 331, 335 (6th Cir. 1990). Nor is Reed persuasive in arguing that only religious objectors are *compelled* to pay an amount equal to the full dues because any nonobjecting member can choose to leave the union and assert *Beck* objector status. That is to say nothing more than that an employee cannot be compelled *if* he is a *Beck* objector. Since the accommodation provided plaintiff in this case was reasonable, the district court did not err in granting summary judgment to the UAW with respect to Reed's religious accommodation claim.

DISSENT

McKEAGUE, Circuit Judge, dissenting. The lead opinion affirms based on Reed's failure to demonstrate either discharge or discipline as part of his prima facie case against his union—a union, it is worth noting, that does not have the power to discharge or to discipline. I do not think either Title VII or our past holdings requires such a showing. An adverse employment action should be all that is required to establish a prima facie case for a religious accommodation claim, and certainly no more than that should be required in a claim against a union. The UAW required Reed to pay more dues because of the religious nature of his objection to the union, and this increased payment was an adverse employment action. I would therefore hold that the increased payment was sufficient to establish the final element of Reed's prima facie case.

I also disagree with the concurring opinion's analysis of the reasonableness of the accommodation. Because I do not agree with either ground offered for affirming the district court's judgment, I respectfully dissent.

I.

Religious accommodation claims against employers arise under the same statutory provisions as other Title VII religions discrimination claims. Title VII makes it an unlawful employment practice to "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or

privileges of employment, because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1). Religion "includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). "The intent and effect of this definition was to make it an unlawful employment practice under § 703(a)(1) [42 U.S.C. § 2000e-2(a)(1)] for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *TWA v. Hardison*, 432 U.S. 63, 74 (1977). Section 2000e-2(a)(1) also provides the basis for religious disparate treatment claims. *See Tepper v. Potter*, 505 F.3d 508, 515 (6th Cir. 2007).

Despite the single statutory source for Title VII religious discrimination claims, our past decisions have incorrectly suggested a different level of harm is required to establish a prima facie disparate treatment claim based on religion than is required to establish a prima facie religious accommodation claim. A disparate treatment claim requires the employee show, among other things, "that he experienced an adverse employment action." *Tepper*, 505 F.3d at 515. An adverse employment action is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761 (1998). A religious accommodation claim, meanwhile, appears to require a plaintiff to make a higher showing that "he was discharged or disciplined for failing to comply

with the conflicting employment requirement." *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987).

This distinction between the amount of harm required under a disparate treatment theory and under a religious accommodation theory is not required by the statute. *See* 42 U.S.C. § 2000e-2(a)(1). It is also not required by our past holdings, though it is true that our religious accommodation precedents do use the "discharge or discipline" language. That is not surprising, because those decisions invoking the third element of the religious accommodation prima facie case almost invariably involve discharged employees. *See Virts v. Consol. Freightways Corp. of Delaware*, 285 F.3d 508, 515 (6th Cir. 2002) (discharged employee); *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 623 (6th Cir. 2000) (discharged employee); *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1378 (6th Cir. 1994) (discharged employee); *McGuire v. Gen. Motors Corp.*, 956 F.2d 607, 609 (6th Cir. 1992); *Smith*, 827 F.2d at 1084 (discharged employee). These cases therefore did not need to address whether a claim could survive without showing that the plaintiff had been discharged.

Our two most recent religious accommodation cases illustrate only that the prima facie case cannot be satisfied without showing some adverse employment action. In *Tepper*, we found that the plaintiff had failed to establish the prima facie case because the only action taken against him was that his employer required Tepper to use unpaid leave for his observance of the Sabbath. 505 F.3d at 514. We noted that this not only failed to establish the prima facie case for religious accommodation, it failed to establish any adverse action at all. *See id.* at 516. Similarly, in *Goldmeier v. Allstate Ins. Co.*, the plaintiffs quit their

jobs before experiencing any adverse effect from their employer's failure to accommodate their religious beliefs. 337 F.3d 629, 633 (6th Cir. 2003). *Tepper* and *Goldmeier* therefore both involve plaintiffs that have not shown any adverse action, much less either discharge or discipline. They do not address whether a claim could succeed upon a showing of an adverse employment action other than discharge or discipline.

Other circuits have stated that an adverse employment action short of discharge or discipline is sufficient to establish the prima facie case for religious accommodation. *See Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004); *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 55 (1st Cir. 2002); *EEOC v. United Parcel Serv.*, 94 F.3d 314, 317 (7th Cir. 1996); *see also Bowles v. New York City Transit Auth.*, 285 F. App'x 812, 813 (2d Cir. 2008); *Ali v. Alamo Rent-A-Car, Inc.*, 8 F. App'x 156, 158-59 (4th Cir. 2001). Indeed, I can find no decision in any circuit in which an appellate court found a plaintiff failed to establish a prima facie case where the plaintiff had demonstrated a materially adverse employment action.

Moreover, our precedents allude to the sufficiency of an adverse employment action in religious accommodation claims. In *Goldmeier*, we rejected the appellants' argument that they need not show any harm in order to satisfy the prima facie case: "neither this court, nor any of its sister circuits with substantively parallel religious discrimination jurisprudence, has ever endorsed the Goldmeiers' conclusion that no adverse employment action need be shown to sustain a prima facie case." 337 F.3d at 637. In *Tepper*, this court equated the "discharge or discipline" element of

the religious accommodation prima facie case with the "materially adverse employment action" requirement of a disparate treatment claim. 505 F.3d at 516.

This case is the first in our circuit to squarely present the question of whether a plaintiff can satisfy the prima facie case for a religious accommodation claim by showing an adverse employment action without showing discharge or discipline. I would hold that a plaintiff should be able to succeed on such a showing. While discharge or discipline (assuming it is sufficiently severe) will always constitute a materially adverse employment action, there is no legal or logical reason why a plaintiff who suffers a materially adverse employment action must also show discharge or discipline.

II.

Further, even assuming that our precedents compel this court to require a showing of discharge or discipline in a religious accommodation suit against an employer, there is no reason to extend that requirement to claims brought against unions. As the lead opinion acknowledges, "the prima facie elements of a religious accommodation case do not always fit nicely into a case against a labor union." There is a reason they do not fit nicely: the artificially high standard that we have previously suggested for a prima facie case against an employer simply can never be met in a claim against a union. As a union can neither discharge nor discipline an employee, applying the "discharge or discipline" element in claims against unions would foreclose all such claims. The lead opinion attempts to avoid this result by simply noting that there is no adverse employment action in this case. As I discuss below, I think it is clear that Reed did suffer an adverse employment

action. Even putting that to the side, however, I cannot see how we can avoid entirely the question of what level of harm a plaintiff must show in a claim against a union. We cannot hold that Reed failed to meet the prima facie case without any indication of what that prima facie case is.

Indeed, Title VII itself suggests there may be a difference between claims against employers and claims against unions. A religious accommodation claim against employers is rooted in 42 U.S.C. § 2000e-2(a)(1). *See Hardison*, 432 U.S. at 73. The Supreme Court has held that the language of that section—"'hire,' 'discharge' 'compensation, terms, conditions, or privileges of employment,' 'employment opportunities,' and 'status as an employee'—explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace." *Burlington N and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62 (2006). The same language does not exist in Title VII's union provision. Instead, it is an unlawful practice for a union to "exclude or . . . expel from its membership, or otherwise to discriminate against, any individual because of his . . . religion," *id.* § 2000e-2(c)(1), or to "cause or attempt to cause an employer to discriminate against an individual in violation of this section." *Id.* § 2000e-2(c)(3). Notably, the phrase "otherwise discriminate against" is similar to that in Title VII's retaliation provision, which the Supreme Court has held is more expansive than the language in the provision giving rise to disparate treatment claims. *See Burlington*, 548 U.S. at 63-64.

Thus, even if this case does not provide an opportunity to clarify exactly what standard should apply in religious accommodation claims against unions (which I submit it does), the difference in statutory

language should at least give us pause before we extend the "discharge or discipline" requirement to claims against unions. Add this difference in statutory language to the practical reality that a "discharge or discipline" requirement would essentially bar religious accommodation claims against unions, and it is clear that we should not impose the "discharge or discipline" requirement in this context.

III.

As discussed above, I believe that a materially adverse employment action is the appropriate standard for all religious accommodation claims. Reed satisfied that standard. The UAW required Reed to make larger payments than secular objectors. This disparity constitutes an adverse employment action. Under Title VII, an employment action must amount to "a materially adverse change" in the terms or conditions of employment to be actionable. *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 885 (6th Cir. 1996); *see also Mitchell v. Vanderbilt Univ.*, 389 F.3d 177, 182 (6th Cir. 2004). Notably, the Supreme Court stated that such an action will "in most cases inflict[ ] direct economic harm." *Ellerth*, 524 U.S. at 762. The economic effect does not have to be large in order to be an adverse employment action. *See White v. Burlington Northern & Santa Fe R. Co.*, 364 F.3d 789, 794, 802 (6th Cir. 2004) (en banc). A differential in pay establishes an adverse employment action. *Fuhr v. School Dist. of City of Hazel Park*, 364 F.3d 753, 758 (6th Cir. 2004).

The UAW required that Reed donate the full amount of union dues to charity rather than the lower amount political objectors must pay the union. If Reed had a secular objection to the union, the amount Reed would have to pay would decrease. This

is a direct economic effect that resulted in Reed receiving less net income. As such, the ongoing higher payment the union requires of religious objectors constitutes an adverse employment action.

IV.

The lead opinion seeks to minimize the significance of this economic burden by relying on *Tepper*. Yet *Tepper* presented a significantly different set of facts. In *Tepper*, the plaintiff sought days off to observe religious holidays. 505 F.3d at 512. His employer originally accommodated him, but later rescinded the accommodation. *Id.* His employer continued to permit the plaintiff to use unpaid leave for all of his holidays. *Id.* The plaintiff alleged that using unpaid leave decreased his pay. *Id.* We dismissed this argument, noting that "[t]he Supreme Court has stated that 'the direct effect of unpaid leave is merely a loss of income for the period the employee is not at work; such an exclusion has no direct effect upon either employment opportunities or job status.' *Id.* at 514. We then concluded that "Tepper is simply not being paid for the time he does not work." *Id.* The same cannot be said for Reed.

Nor am I persuaded that the fact the adverse employment action in this case occurs as part of an accommodation should alter the analysis of the prima facie case.

There is no indication in our case law that the prima facie case is limited in this way. In *Tepper*, for example, we found that the prima facie case was not satisfied because the accommodation did not harm the plaintiff—not because the harm to the plaintiff was part of an accommodation. *See* 505 F.3d at 514.

Moreover, the lead opinion's arbitrary distinction between employer/union practices that "count" for the prima facie religious accommodation case and those that do not places religious employees in an unavoidable bind. If an employer or union offers the employee an accommodation that adversely affects the terms and conditions of his or her employment, the employee can do nothing but lose. If the employee accepts the accommodation, then, under the lead opinion's view, the employee has acquiesced in the discrimination and abandoned any hope of a remedy. Meanwhile, if an employee rejects the accommodation, the employee not only puts his or her employment in jeopardy, the employee also runs afoul of the Supreme Court's instruction that the employer, not the employee, chooses the accommodation. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67-69 (1986). The lead opinion does not—and I think cannot—explain what an employee placed in this position should do in order to appropriately assert his or her rights under Title VII.

V.

I also find the concurring opinion unpersuasive in its analysis of the reasonableness of the accommodation at issue here. Unlike the concurring opinion, I do not think it is enough to say that Reed's objection is different from other accommodated objectors. Though this is undoubtedly true, it does not explain why the accommodation is reasonable.

While the union does not have to use the accommodation proffered by the employee, the union must offer a *reasonable* accommodation. *See E.E.O.C. v. Univ. of Detroit*, 904 F.2d 331, 334 (6th Cir. 1990). I would find the accommodation here unreasonable for two reasons: the union cannot require a payment of

this size from a nonmember, and the accommodation is discriminatory.

The Supreme Court has held that unions may exact from objecting nonmembers "only those fees and dues necessary to performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." *Commc'n Workers of Am. v. Beck*, 487 U.S. 735, 762-63 (1988) (internal quotation marks and citation omitted). Based on this, the Sixth Circuit has observed that *Beck* "limit[ed] the amount of dues a union can charge a non-union member." *United Food and Commercial Workers Local 951 v. Mulder*, 31 F.3d 365, 367 (6th Cir. 1994). If a union cannot charge an objecting nonmember more than the *Beck* amount, it seems to me that there is no basis for offering an accommodation in excess of that amount. As Reed is an objecting nonmember, it seems to me that a reasonable accommodation should be based on the amount that the union can require from objecting nonmembers under *Beck*.[1]

In this regard, I find persuasive the district court opinion in *O'Brien v. City of Springfield*. Relying on a state statute and a state regulation that provided a rule similar to the rule established in *Beck*,[2] a Massa-

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[1] Although Reed did not articulate the argument in quite this fashion, he did raise a functionally identical argument in his briefs. Rather than phrasing the argument in terms of the amount the union can require him to pay, he argued that *Beck* gave objectors the right to choose not to pay the portion of union dues used for political purposes.

[2] The union notes that, unlike under *Beck*, the Massachusetts law does not permit unions to charge any nonmembers more than the agency service fee. *See* Mass. Gen. Laws ch. 150E, § 12; Mass. Regs. Code tit. 456, § 17.04. For the reasons given below

chusetts district court held that requiring a donation equal to full union dues was "a *per se* unreasonable accommodation." 319 F. Supp. 2d 90, 107 (D. Mass. 2003). It further explained that a union "is not entitled to charge whatever amount it wishes to someone making a charitable substitution." *Id.* at 106. The same reasoning should apply under *Beck*. The union should not be able to require objecting nonmembers to pay any more than *Beck* permits.[3] As Reed is an objecting nonmember, I would find that the union's attempt to force Reed to donate the full union dues amount rather than the amount paid by *Beck* objectors is unreasonable.

Further, the accommodation is discriminatory. The union admits that it prefers the elevated amount

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in footnote 3, I do not think this distinction alters the analysis of the reasonableness of the accommodation in this case.

[3] The union argues that, because nonmembers who do not object can be required to pay the full amount, the relevant benchmark should be the full dues amount. However, there is absolutely no dispute here that Reed has made his objections known to the union. Therefore, the relevant amount should be the Beck amount, not the full dues amount. So long as an objector makes his or her objection known, the union *cannot* charge the full dues amount under *Beck*. *See Beck*, 487 U.S. at 762-63; *Int'l Assoc. of Machinists v. Street*, 367 U.S. 740, 774 (1961). What the union can charge other employees should therefore be irrelevant in determining the accommodation for Reed. Rather, the relevant standard should be based on the status of the employee in question. It would likewise be fruitless for an employer to argue that, when reviewing the termination of a for-cause employee, the court should consider that an employer can fire an at-will employee for any reason. Instead, what matters is the for-cause status of the employee in question. Similarly, the union should not point to the dues it can require other employees to pay; what matters is the amount it could otherwise require Reed to pay.

because "this arrangement does not create any financial incentive for employees to claim religious objection in order to reduce their financial obligations." Response Br. at 32. The value of the higher amount is precisely its deterrence of other members and nonmembers from asserting their religious objections. The union offers no other reason for requiring the elevated payments, and I cannot think of a nondiscriminatory reason for requiring religious objectors such as Reed to pay more in order to accommodate their objections. I would therefore find the amount the union requires Reed to pay is discriminatory. As such, the accommodation should also be deemed unreasonable under *Ansonia Board of Education v. Philbrook*. *See* 479 U.S. 60, 71 (1986) ("Such an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness.").

VI.

There is no question that the only way Reed could avoid the conflict between his religious beliefs and the UAW's requirements was through a payment greater than that required of other objectors. I would find this sufficient to establish the third prong of the prima facie case for religious accommodation. I also would find the accommodation offered by the union unreasonable because the union lacks the authority to require such a large payment and the accommodation discriminates against religious objectors. Accordingly, I respectfully dissent.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed May 07, 2009]

No. 07-2505

JEFFREY J. REED,
Plaintiff-Appellant,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Defendant-Appellee.

Before: GUY, BATCHELDER, and McKEAGUE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court granting summary judgment in favor of defendant International Union, United Automobile, Aerospace and Agricultural Implement Workers of America is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

APPENDIX E

[523 F.Supp.2d 592]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed October 19, 2007]

Case No. 06-14233

JEFFREY J. REED,

Plaintiff,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Defendant.

OPINION & ORDER

Sean F. Cox, District Judge.

Plaintiff Jeffrey Reed ("Plaintiff" or "Reed") filed suit against Defendant International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("Defendant" or "the Union"). Plaintiff contends that the Union failed to provide a reasonable accommodation for his religious conflict with paying dues to the union, in violation of Title VII of the Civil Rights Act. Discovery has concluded and the parties agree that there are no genuine issues of material fact for trial. The matter is currently before the Court on the parties' cross-motions for Summary Judgment. The parties have fully briefed the issues and the Court heard oral argument on October 4, 2007. For the reasons below,

the court shall DENY Plaintiff's Motion for Summary Judgment and shall GRANT Defendant's Cross-Motion for Summary Judgment.

BACKGROUND

Reed is an hourly employee of AM General Corporation ("AM General"). Defendant is the exclusive bargaining representative for the assembly line employees. Defendant and AM General Corporation have a collective bargaining agreement ("CBA") that contains a union security provision that requires employees to join the Union or pay non-union member fees to Defendant as a condition of employment.

AM General and Defendant have also entered into an agreement that permits employees who have a sincere religious objection to financially supporting labor organizations to satisfy their financial obligations under the CBA's union security provision by contributing to charity an amount equal to the dues established by the Union Constitution. (Def.'s Statement of Material Facts, and Plaintiff's Response to same, at ¶ 3).

Dues for the Union are two hours straight time pay per month. (*Id.* at ¶ 4). Both members and non-members who do not object to the activities for which the Union expends their payments make union security payments to the Union in the amount of two hours straight time pay per month. (*Id.* at ¶ 5).

Reed joined the Union shortly after he was hired by AM General in May, 2002. (*Id.* at ¶ 1). For the first year of his Union membership, Reed paid his full dues to the Union.

In May, 2003, Reed requested to be treated as an objecting member and his request was granted. (*Id.* at ¶8).

As a result of *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), the Union's Constitution has a provision which permits nonmembers to object to the Union's expenditure of their dues for purposes primarily political in nature and to receive a rebate of the amount of their dues so expended ("*Beck* objectors"). (*Id.* at ¶¶ 6 & 7).

In October, 2004, Reed notified the Union that he was terminating his membership. After that time, the Union treated Reed as a *Beck* objector and his union security payments were reduced to 78.29% of what Union members and non-objecting nonmembers paid. (*Id.* at ¶¶ 14 & 15).[1]

In a letter to the Union dated February 10, 2005, Reed stated that he is a religious objector, and requested that he be permitted to direct his *Beck* union security payment to a charity, the Disabled Veterans of America, rather than to the Union. (*Id.* at ¶ 16). The Union then requested additional information from Reed. By letter of November 10, 2005, the Union advised Reed that his application to be treated as a religious objector was being granted retroactive to February 2005, when he first applied. (*Id.* at ¶ 28).

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[1] Each year, the Union prepares a report that provides notice of the percentage of Union expenditures that are expended for purposes related and not related to representation and collective bargaining. (*Id.* at ¶ 11). The two hours pay per month union security payments of *Beck* Objectors are then reduced by the non-representational expenditure percentage established in that report. (*Id.* at ¶12). For the 12 months beginning August 2004, *Beck* objectors paid 78.29% of two hours straight time pay as their union security obligation. (*Id.* at ¶13).

Reed requested that he be permitted to pay to the Disabled American Veterans an amount equal to the amount paid to the Union by non-member *Beck* objectors. (Compl. & Ans. at ¶ 13). That request was not granted. Rather, the Union provided Reed with a worksheet showing that his union security obligations as a religious objector under the Letter Agreement would be $439.44 for the period from February through November, 2005. (*Id.* at ¶ 29). That $439.44 represents the same amount that Reed would have paid to the Union as a non-objecting member. As a *Beck* objector he paid only $339.62 for that same period. (*Id.*).

The Union advised Reed that if he made a contribution in the amount of $439.44 to a charity he selected from those listed in the Letter Agreement, the Union would refund the $339.62 he had paid as a *Beck* objector. (*Id.* at ¶ 30). Reed made the payment to a charity he selected and the Union refunded him the amount he had previously paid as a *Beck* objector. (*Id.* at ¶ 31). Since November, 2005, Reed has made no payments to the Union, but rather, has been making payments to the charity he selected. (*Id.* at ¶ 33). Reed pays the same amount to the charity that he would have paid as a non-objecting member of the Union.

Reed then filed a complaint with the Equal Employment Opportunity Commission ("the EEOC"). After an investigation, the EEOC concluded that there is reasonable cause to believe that a violation of Title VII has occurred and issued a right to sue letter. The EEOC concluded that Defendant "refused to make a non-discriminatory reasonable accommodation to his sincerely held religious beliefs." (*See* Ex. G to Pl.'s Br.).

Reed filed this action against Defendant on September 26, 2006, alleging that Defendant violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*. In this action, Reed seeks a declaration that he has the right to an accommodation of his religious beliefs that allows him to pay only the fees paid by non-members who object for secular reasons (*i.e.*, the *Beck* objector amount) to a mutually agreed upon charity.

ANALYSIS

In their cross-motions for summary judgment, each party asserts that it is entitled to summary judgment under the undisputed facts of this case.

A. Plaintiff's Position:

Reed acknowledges that it is a reasonable accommodation to allow him to redirect his compulsory union fees to a mutually agreed charity. Reed's objection is with the *amount* he is required to pay to the charity. Reed seeks a declaration that he has the right to an accommodation of his religious beliefs that allows him to pay only the fees paid by *Beck* objectors (*i.e.*, ~ 78% versus 100% of regular dues).

He contends that by requiring him to pay the full amount of dues to a charity as a religious objector, the Union is requiring him to pay a "premium," "penalty" or "faith tax" as a religious objector that *Beck* objectors, who he claims are "secular," do not pay. At the hearing, however, Reed's counsel conceded that a *Beck* objector may elect that status for either secular or nonsecular reasons.

Reed relies on *O'Brien v. Springfield Education Ass'n*, 319 F.Supp.2d 90, 106-07 (D. Mass 2003), wherein the district court ruled that when a union

offered to accommodate a religious objector by requiring a charity-substitution payment equal to dues, the union had made a "per se unreasonable accommodation." Reed acknowledges that there are only two reported decisions on this issue: *O'Brien* and a decision contrary to *O'Brien, Madsen v. Associated Chino Teachers*, 317 F.Supp.2d 1175 (C.D. California 2004).

Reed contends that this Court must choose between two paths: 1) the "*Madsen* path," which Reed contends discourages as many employees as possible from taking advantage of the protections of their faith, or 2) the "*O'Brien* path," which Reed contends "encourages the protection of employees' faith, even if there is some (but not much) adverse impact on union treasuries." (Reed's Response Br. at 3).

B. Defendant's Position:

Defendant contends that Plaintiff's motion must be denied because the substituted charity option that Defendant provided to Reed is a reasonable accommodation of his religious objections under Title VII. Defendant asserts that under *Ansonia*, employers satisfy their accommodation obligation under Title VII by providing any reasonable accommodation and that they need not provide the specific accommodation requested by the employee. *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986). Defendant therefore contends that the issue is whether the accommodation it provided is reasonable.

Defendant notes that the Letter Agreement between AM General and Defendant that permits religious objectors to make payments to charity in an amount equal to dues is based on Section 19 of the National Labor Relations Act, which provides in pertinent part:

> Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations **shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employees' employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund** exempt from taxation under section 501 (c)(3) of title 26 of the Internal Revenue Code, chosen by such employee from a list of at least three such funds, designated in such contract or if the contract fails to designate such funds, then to any such fund chosen by the employee. If such employee who holds conscientious objections pursuant to this section requests the labor organization to sue the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such procedure.

29 U.S.C. §169 (emphasis added).

Defendant asserts that the legislative history shows that in passing Section 19, Congress intended to provide an arrangement for religious objectors that served as a reasonable accommodation of their beliefs that satisfied the reasonable accommodation requirements of Title VII. (*See* Def.'s Response Br. at 9). Defendant notes that numerous courts have found a substituted charity accommodation to be reasonable.

Defendant notes that while the Sixth Circuit found Section 19 to be unconstitutional, because it restricted the substituted charity accommodation to employees who "adhere to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations," the Sixth Circuit has never questioned the legality or reasonableness of the substituted charity accommodation as reasonable:

> Where a collective bargaining agreement includes a union security provision, courts have held that the duty to accommodate is satisfied by allowing an employee to donate an amount **equal to union** dues to a mutually acceptable charity . . . The substituted charity accommodation lets the union enjoy the benefits of a union security provision while permitting employees 'to practice in accordance with their religious convictions.'

Wilson v. National Labor Relations Board, 920 F.2d 1282, 1286 (6th Cir. 1990)(emphasis added).

Defendant also relies on *Madsen*, and the reasoning in that opinion, to support its motion for summary judgment.

Defendant further asserts that Reed's argument that he is being forced to pay "more than anyone else" is not supported in fact. Defendant notes that Reed pays the same amount that is paid by 1698 of 1699 of his co-workers. Defendant notes that of the 1700 bargaining unit employees at AM General, only Reed and one other employee elected Beck status, and Reed was the only employee to request treatment as a religious objector. (*See* Def.'s Reply Br.). Reed acknowledged the accuracy of these facts at the October 4, 2007 hearing.

C. The Court Concludes That Defendant Is Entitled to Summary Judgment Because Plaintiff Has Failed To Establish A Prima Facie Case Of Religious Discrimination.

Title VII provides that it is an unlawful employment practice for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's religion. 42 U.S.C. §2000e-2(a). The proscription against religious discrimination applies equally to a labor organization such as Defendant. *See* 42 U. S.C. §2000e-2(c).

A claim for religious discrimination under Title VII can be asserted under several different theories, including disparate treatment and failure to accommodate. Here, Reed relies exclusively on a failure to accommodate theory.

"The analysis of any religious accommodation case begins with the question of whether the employee has established a prima facie case of religious discrimination." *Virts v. Consolidated Freightways Corp.*, 285 F.3d 508, 516 (6th Cir. 2002). The employee bears the burden of establishing a prima facie case, and sustains that burden by showing that: 1) he holds a sincere religious belief that conflicts with an employment requirement; 2) he has informed his employer of the conflict; and 3) **he was discharged or disciplined for failing to comply with the conflicting requirement.** *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1378 (6th Cir. 1994)(emphasis added); *see also Goldmeier v. Allstate Ins. Co.*, 337 F.3d 629, 633 (6th Cir. 2003); *Tepper v. Potter*, __F.3d __ (6th Cir. Oct. 15, 2007).

With respect to that third element of a prima facie case, the Sixth Circuit has "consistently held that a

prima facie case of religious discrimination requires discharge or discipline for failure to comply with an employment requirement." *Goldmeier,* 337 F.3d at 634-35. In *Goldmeier*, the plaintiffs had not been discharged or disciplined but nevertheless attempted to pursue a religious discrimination claim and urged the court to abandon that requirement. The Sixth Circuit rejected such arguments. *Goldmeier*, 337 F.3d at 637 ("Nevertheless, for a number of reasons, we hold that discharge or discipline remains an element of a prima facie case of religious discrimination in employment.").

Here, Reed is still employed and has been paying an amount equivalent to regular dues to a designated charity. Unlike the plaintiff in *O'Brien*,[2] Reed's counsel acknowledged at the October 4, 2007 hearing that Reed has not been discharged or disciplined for any failure to pay dues.

Reed contends, however, that he is not required to show that he was discharged or disciplined before bringing his religious accommodation claim. At the October 4, 2007 hearing, Reed's counsel acknowledged that he was unaware of any Sixth Circuit authority that would allow him to establish a prima facie face of religious discrimination without establishing that such discipline or discharge had occurred. Counsel asserted that the closest Sixth Circuit case would be *Smith v. Pyro Mining Co.*, 827 F.2d 1081 (6th Cir. 1987). He also noted that the plaintiff in *Ansonia, supra*, had not been disciplined or discharged, yet was able to challenge the reasonableness of the accommodation offered.

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[2] The plaintiff in *O'Brien* was suspended without pay for failing to pay the agency service fee. *O'Brien*, 319 F.Supp.2d at 96.

The Court finds Reed's reliance on *Smith* and *Ansonia* to be misplaced. In *Smith*, the court stated that:

> The analysis of any religious accommodation case begins with the question of whether the employee has established a prima facie case of religious discrimination. Such a case is established when an employee shows that: (1) he holds a sincere religious belief that conflicts with an employment requirement; (2) he has informed the employer about the conflicts; **and (3) he was discharged or disciplined for failing to comply with the conflicting employment requirement.**

Smith, 827 F.2d at 1085 (emphasis added). The court concluded that Smith, who was discharged because of his refusal to work on Sundays, had established a prima facie case. *Id.* at 1086. Only after determining that Smith had established a prima facie case did the analysis proceed to determining whether Smith's employer offered a reasonable accommodation. *Id.* at 1086 ("Having found that Smith established a prima facie case of discrimination, our analysis now shifts to the question of whether [Smith's employer] reasonably accommodated Smith's religious beliefs.")

Contrary to counsel's statements at oral argument, *Ansonia* does not support the proposition that the third element of the prima facie case is unnecessary. In *Ansonia*, the claim was not dismissed in the district court for want of a prima facie case, but rather, the action proceeded to a full trial on the merits. Due to the unique procedural posture of the case upon reaching the Supreme Court, the *Ansonia Court* held that "the issue whether [plaintiff] made out a prima facie case **was no longer relevant.**" *Ansonia*, 479 U.S. 60 at 61 (emphasis added). Thus, as the Sixth

Circuit noted in *Goldmeier*, the *Ansonia* Court "explicitly declin[ed] to rule on the existence of a prima facie case." *Goldmeier*, 337 F.3d at 637.[3]

The Court concludes that without being able to establish that he has been either discharged or disciplined for failing to comply with the employer's requirements concerning union dues payments, Reed cannot establish a prima facie case of religious discrimination under existing Sixth Circuit precedent. *See Cooper*, *supra*; *Goldmeier*, *supra*. If unable to establish a prima facie case of religious discrimination, Reed's claim fails and the Court need not consider whether Defendant provided a reasonable accommodation. *See Goldmeier*, 337 F.3d at 638.

D. In Addition, Assuming *Arguendo* That Plaintiff Could Establish A Prima Facie Case Of Religious Discrimination, Defendant's Accommodation Was Reasonable.

If Reed could establish a prima facie case of religious discrimination, the next inquiry would be to determine whether Defendant provided a reasonable accommodation for Reed's religious conflict.[4]

"It is well established that under Title VII, a 'reasonable accommodation' of an employee's religion is

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[3] The Court also finds Reed's reliance on *White v. Burlington Northern*, 364 F.3d 789 (6th Cir. 2004), a case wherein the plaintiff had been suspended without pay, misplaced. (*See* Pl.'s Suppl. Br.).

[4] In addition, if Defendant's efforts failed to eliminate the employee's religious conflict, then Defendant would have to establish that it is unable to reasonably accommodate the employee's beliefs without incurring "undue hardship." To require the Defendant to bear more than a *de minimis* cost in order to accommodate an employee's religious beliefs is an undue hardship. *Cooper*, *supra*

one that eliminates the conflict between the employment requirements and the employee's religious practices." 45A AM JUR.2D *Job Discrimination* §133. "The focus of the inquiry as to what type of accommodation is 'reasonable' is on whether the accommodation preserves the employee's terms, conditions, and privileges of employment, once the employer has eliminated the religious conflict with the employee's requirements." *Id.*

An employee is entitled only to a reasonable accommodation, not an accommodation of his choosing. *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986). "By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation." *Id. at 68; Smith v. Pyro Mining Company*, 827 F.2d 1081, 1085 (6th Cir. 1987). "Thus, where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship." *Ansonia*, 479 U.S. at 68-69.

"The reasonableness of an employer's attempt at accommodation cannot be determined in a vacuum. Instead, it must be determined on a case-by-case basis; **what may be a reasonable accommodation for one employee may not be reasonable for another.**" *Smith*, 827 F.2d at 1085 (emphasis added). Thus, each case involving such a determination will depend upon its own facts and circumstances and comes down to a determination of reasonableness under the unique circumstances of the individual employer-employee relationship. *Id.*

In this case, Reed was originally a member of the Union and paid his full dues to the Union. About a

year later, Reed became a *Beck* objector (*i.e.*, he objected only to paying that portion of his Union dues that would be used for the Union's political activity). As a *Beck* objector, Reed paid to the Union only the reduced *Beck* fees which are approximately 78% of the regular dues. Notably, of the 1700 bargaining unit employees at AM General, only Reed and one other employee elected *Beck* objector status.

Later, however, Reed advised Defendant that he objected to paying *any dues* to the Union on the basis of his religious beliefs. As an attempt to accommodate Reed's religious beliefs, Defendant advised Reed that he could make a substitute charity payment, equivalent to the amount of dues paid by 1698 of 1699 of Reed's co-workers.

The accommodation provided by Defendant eliminated the conflict between Defendant's requirement that Reed pay dues to the Union and Reed's personal religious beliefs, which he claims now prevent him from making any payments to the Union. Indeed, Reed's counsel acknowledged at the hearing that the conflict between Defendant's requirement and Reed's religious beliefs is eliminated by the substituted charity payment allowed by Defendant. Nevertheless, Reed claims that the accommodation is not reasonable because it is a "discriminatory accommodation" in that it requires Reed to pay an amount that is more than "any other objector who objects to paying dues for secular reasons."

In *Cooper*, the Sixth Circuit observed that an accommodation that results in the employee in question losing an employment benefit "enjoyed by all other employees who do not share the same religious conflict," is not reasonable because it is discriminatory. In that case, the plaintiff's religious beliefs did

not allow her to work on Saturdays. The employer's proposed accommodation was to allow the employee to use her vacation time to avoid working on Saturdays scheduled for production. The Court found that accommodation was not reasonable because it required the plaintiff to lose an employment benefit, her accrued vacation time, that was enjoyed by all other employees who did not share her religious conflict with working on Saturdays.

Unlike *Cooper*, this is not a situation where the accommodation provided by Defendant forces Reed to lose a benefit "enjoyed by all other employees" without a religious conflict. Indeed, the accommodation provided has Reed paying the very same amount as the overwhelming majority (1698 out of 1699) of his co-workers, who do not have either secular or nonsecular objections to the Union. On the record before this Court, there is only one employee out of the 1700 bargaining unit employees who is a *Beck* objector.[5] Thus, this is not a case where Reed is charged more than "everybody else." The accommodation provided eliminates Reed's religious conflict and does not result in the loss of any employment benefits to Reed.

Moreover, to the extent that Reed complains that the accommodation "discourages" him from asserting his religious objection to paying dues to the Union because he is now paying a total amount that is higher than the total amount he used to pay as a *Beck* objector, the Court finds that argument without merit. The Union has reasonably accommodated Reed in each of the various positions that he has asserted throughout his employment: 1) dues paying Union member, 2) *Beck* objector, and 3) religious objector. It

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[5] It is unknown whether that *Beck* objector elected that status based on secular or nonsecular reasons.

is not discriminatory to provide different accommodations to employees who assert different objections.

Group:	Accommodation:	Results:
Union Member having no objection to paying Union dues for representtation or political activity.	No accommodation was necessary, Reed paid his regular dues to the Union.	Union members pay their fair share of representation costs and political activity.
Beck Objector objecting to paying only that portion of union dues that is used for political activity, but not objecting to paying for cost of representation.	Reed was appropriately treated as Beck objector. Union broke down its costs and as *Beck* Objector Reed paid to the Union only that portion of Union dues that is used for representation (*i.e.*, he did not pay for political activity).	*Beck* Objectors pay for their fair share of representation costs but pay nothing to the Union towards the political activity they object to.
Religious Objector objecting to paying union dues for political activity and objecting to paying dues for the cost of representation.	As a religious objector Reed is permitted to pay nothing to Union and, instead, is permitted to donate an amount equal to his normal dues to a charity.	Religious Objectors pay nothing to the Union, although they receive the benefits of representation. Religious Objectors also get benefit of being able to support a charity of their choice (from those listed) and perhaps tax deduction for doing so.

In addition, to the extent that Reed complains that the accommodation discourages him from asserting his religious objection to paying dues to the Union because he is now paying a total amount that is higher than one of his fellow employees, who is a *Beck* objector, that is a disparate treatment argument and Reed has expressly disavowed such a theory. Moreover, even if Reed raised a disparate treatment theory, the Court agrees with the reasoning in *Madsen* that such a claim is without merit under the facts presented here.

CONCLUSION & ORDER

For the reasons set forth above, **IT IS ORDERED** that Defendant's Motion for Summary Judgment is **GRANTED** and Plaintiff's Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

/s/ Sean F. Cox
Sean F. Cox
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 06-14233

JEFFREY J. REED,

Plaintiff,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Defendant.

JUDGMENT

For the reasons set forth in an Opinion & Order issued this date,

IT IS ORDERED, ADJUDGED, AND DECREED that Plaintiff's Complaint is **DISMISSED WITH PREJUDICE.**

/s/ Sean F. Cox
Sean F. Cox
United States District Judge

Dated: October 19, 2007

APPENDIX G

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Indianapolis District Office

101 West Ohio Street, Suite 1900
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June 08, 2006

Jeff J. Reed Charge Number 24M-2005-00194
9708 Beechnut Street
Bridgman, Michigan 49106 Charging Party

UAW International
8000 E. Jefferson Avenue
Detroit, Michigan 48214 Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue the following determination as to the merits of the subject charge under Title VII of the Civil Rights Act of 1964, as amended (Title VII).

All requirements for coverage have been met. Charging Party alleges that he was discriminated against because of his religion, Catholic, in violation of the Title VII, in that Respondent has refused to make a non-discriminatory reasonable accommodation to his sincerely held religious beliefs.

Based upon the investigation, the Commission concludes that there is reasonable cause to believe that a violation of Title VII has occurred.

This determination does not conclude the processing of this charge. The Commission will begin conciliation efforts to resolve all matters where there is reason to believe that a violation has occurred.

Disclosure of information obtained by the Commission during the conciliation process will be made in accordance with Section 706(b) of Title VII and Section 1601.26 of the Commission's Procedural Regulations. When the Respondent declines to enter into settlement discussions, or when the Commission's representative for any other reason is unable to secure a settlement acceptable to the Office Director, the Director shall so inform the parties in writing and advised[sic] them of the court enforcement alternative available to the Charging Party and the Commission.

On Behalf of the Commission:

/s/ Joy L. Pentz for:
Danny G. Harter
District Director

cc: Barry A. Macey
MACEY SWANSON & ALLMAN
445 N. Pennsylvania St.
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APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed September 21, 2009]

No. 07-2505

JEFFREY J. REED,
Plaintiff-Appellant,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Defendant-Appellee.

ORDER

BEFORE: BATCHELDER, Chief Judge; GUY and McKEAGUE, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge McKeague would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

Supreme Court, U.S.
FILED
MAR 4 - 2010
OFFICE OF THE CLERK

No. 09-709

IN THE

Supreme Court of the United States

JEFFREY J. REED,
Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

JEFFREY J. REED,
Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Petitioner, Jeffrey Reed, is employed by AM General in a bargaining unit represented by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (UAW). "The collective bargaining agreement between UAW and AM General includes a union security provision under which all AM General employees must either become UAW members or pay the union an agency fee equal to the amount of membership dues." Pet. App. 2a. "UAW and AM General also are parties to a letter agreement that allows any employee with a *bona fide* religious objection to joining or supporting a labor union to satisfy his union security obligation by making a payment equal to full membership dues to one of three

charities mutually designated by UAW and AM General." *Ibid.*

The Petitioner brought suit against the UAW alleging that the religious objection accommodation provided for in the letter agreement violates the prohibition of religious discrimination contained in Title VII of the Civil Rights Act of 1964. Pet. App. 4a. The Sixth Circuit affirmed the district court's summary judgment in favor of the UAW on the ground that the Petitioner had failed to make out a prima facie case of religious discrimination. *Id.* at 7a. In this regard, the court explained that the Petitioner's claim failed because he had not shown "any adverse employment action." *Id.* at 8a.

The Petitioner began working at AM General in May 2002. Pet. App. 3a. For the first two and a half years of his employment, the Petitioner was a member of the UAW paying the membership dues required by the UAW Constitution. *Ibid.* In October 2004, the Petitioner resigned his union membership and filed an objection to financially supporting any union activities beyond those that are germane to collective bargaining. *Ibid.* In response, the "UAW notified [the Petitioner] that it would treat him as an objecting non-member and directed AM General to deduct from [the Petitioner's] pay an agency fee consisting only of that portion of the union dues not used for [nongermane] expenditures." *Ibid.*

Five months after he became an "objecting non-member," the Petitioner notified the UAW that "he had religious objections to supporting the union in any amount," even the reduced agency fee charged to him as an objecting non-member. Pet. App. 3a. After receiving confirmation that the Petitioner "held *bona fide*, personal convictions against supporting the union, UAW granted [the Petitioner's] request to be treated as a religious objector" and instructed him to pay an "amount [equal to] full union dues . . . to one

of the three charities selected by UAW and AM General." *Ibid.*

The Petitioner's sole basis for claiming that he has been discriminated against on account of his religious beliefs is that the UAW handled his objection to financially supporting union activities that are not germane to collective bargaining differently than his objection to financially supporting any union activities, including those that are germane to collective bargaining. Consistent with the line of cases following this Court's decision in *Communications Workers of Am. v. Beck*, 487 U.S. 735 (1988), the UAW and AM General responded to the Petitioner's objection to paying an agency fee equal to full dues by reducing the fee charged to him to reflect union expenditures that are not germane to collective bargaining. And, consistent with Section 19 of the National Labor Relations Act and numerous decisions applying the religious accommodation provisions of Title VII, the UAW and AM General responded to the Petitioner's objection to paying any amount to the union by instructing him to pay an amount equal to dues to a charity.

REASONS FOR DENYING THE WRIT

I. The Sixth Circuit Decision Does Not Conflict With Other Circuits

The Petition for Certiorari rests primarily on the assertion that the circuits are "divided over what type of adverse action can be required" to make out a prima facie case of religious discrimination. Pet. 11. *See id.* at 10-21. The Petitioner maintains that some circuits, including the court below, require a showing of "discharge or discipline," while others require "something less . . . than discharge or discipline." *Id.* at 12, 14. There is no such division among the circuits.

The Petitioner's attempt to establish a conflict among the circuits rests on nothing more than the fact that some opin-

ions use the phrase "discharge or discipline" to describe the showing of "adverse employment action" uniformly required by all circuits as an element of establishing a prima facie case of religious discrimination. The phrase "discharge or discipline" is most commonly employed in cases where the adverse employment action has in fact taken that form. No court has ever held that an employee failed to establish a prima facie case of religious discrimination because he showed only that he suffered the kind of material harm courts characterize as an "adverse employment action" but did not show "discharge or discipline." The court below expressly stated that it was *not* dismissing the Petitioner's claim on that ground.

A. The Sixth Circuit Held There Was No Adverse Employment Action

The district court dismissed the Petitioner's complaint based on that court's conclusion that the UAW was "entitled to summary judgment because plaintiff has failed to establish a prima facie case of religious discrimination." Pet. App. 63a. The Sixth Circuit's opinion affirming that ruling uses the phrase "discharge or discipline" to describe the adverse employment action element of a prima facie case of religious discrimination.[1] *Id.* at 6a-7a. But the Sixth Circuit makes clear that it was *not* addressing the "question of whether 'discharge or discipline' should be understood to include any adverse employment action" and that it was *not* holding that "a plaintiff can[not] proceed on a showing of an employment action that is 'adverse' but is not a form of 'discharge of discipline.'" *Id.* at 8a. Instead, the court expressly held that the Petitioner had not established a

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[1] The first two elements of a prima facie case in support of a religious accommodation claim require the plaintiff to show "(1) he holds a sincere religious belief that conflicts with an employment requirement; and (2) he has informed the employer about the conflict." Pet. App. 6a.

prima facie case because he had not shown "an adverse employment action." *Ibid.*

The Sixth Circuit was very clear that its affirmance of summary judgment was based on the Petitioner's failure to show "a *materially* adverse change in the terms or conditions of his employment." Pet. App. 9a. In this regard, the court explained that, to establish a prima facie case of religious discrimination, it is necessary for the plaintiff to show that he "has suffered some independent harm caused by a conflict between his employment obligation and his religion." *Id.* at 7a.

Consistent with the opinion in this case, the Sixth Circuit has explained that the circuit's requirement that a plaintiff satisfy the so-called "discharge or discipline" element of the prima facie case is consistent with requirements in all circuits that an "adverse employment action need[s to] be shown to sustain a prima facie case." *Goldmeier v. Allstate Insurance Co.*, 337 F.3d 629, 637 (6th Cir. 2003).[2] Thus, as occurred in this case, Sixth Circuit opinions use both the phrases "discharge or discipline" and "adverse employment action" in describing the harm element of a prima facie case of religious discrimination and reach the same result whichever language they use. *See, e.g., Tepper v. Potter*, 505 F.3d 508, 514 (6th Cir. 2007) (same result reached using "discharge and discipline" language as third element of prima facie case for failure to accommodate claim as court reached using "adverse employment action" language to decide whether the same conduct was "disparate treatment").

B. There Is No Split Among The Circuits

The phrase "discharge or discipline" is frequently used

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[2] In *Goldmeier* the Sixth Circuit affirmed the district court's finding that the "Goldmeiers had not suffered an adverse employment action and therefore failed to make out a prima facie case of religious discrimination. 337 F.3d at 633.

interchangeably with the phrase "adverse employment action" in describing the elements of a prima facie case of religious discrimination. For instance, in *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986), this Court used the phrase "disciplined for failure to comply with the conflicting employment requirement" interchangeably with the phrase "suffered a detriment . . . from the conflict" in describing the prima facie case test applied by the Second Circuit. *Id.* at 65-66.[3] When the courts use the phrase "discharge or discipline," they do so as a shorthand description of the required showing of "detriment" or "adverse employment action."

Nothing demonstrates this so clearly as the opinions from the Second, Eighth and Ninth Circuits – circuits that the Petitioner maintains "allow a showing of adverse action by something less than discharge or discipline," Pet. 14 – that describe the harm element of a prima face case by using the words "discharge" or "discipline." In the Second Circuit decisions cited by Petitioner as evidence that the Second Circuit requires "something less (sometimes much

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[3]Contrary to the assertion made by the Petitioner here, the petitioners in *Ansonia*, did *not* challenge the lower court's articulation of "the elements of a prima facie case for religious accommodation." Pet. 10. Rather, the *Ansonia* petitioners argued, "Because Philbrook is neither required to choose between his employment status and his religion, nor required to forego a benefit to which he would otherwise be entitled because of his religion, he has not established a case of discrimination based on religion." Pet. Br. 8, *Ansonia*, 479 U.S. 60 (No. 85-495). In arguing that "Philbrook failed to meet the first and third prongs of the three-prong test applied by the court of appeals," the *Ansonia* petitioners expressly stated that they were "not arguing that because Philbrook has not been discharged, Title VII is inapplicable." Pet's. Reply Br. 5-6, n.5, *Ansonia*, 479 U.S. 60 (No. 85-495). The Court found it unnecessary to address whether the court below had correctly applied the three-prong test for a prima facie case, since "the defendant here failed to persuade the District Court to dismiss the action for want of a prima facie case, and the case was fully tried on the merits." *Ansonia*, 479 U.S. at 67.

less) than discharge and discipline," the court actually says plaintiffs must show they "were *disciplined* for failure to comply with the conflicting employment requirement." *Knight v. Connecticut Department of Public Health*, 275 F.3d 156, 167 (2d Cir. 2001)(emphasis added); *Bowles v. New York City Transit Auth.*, 285 Fed. Appx. 812 (2d Cir. 2008). In *Bowles*, the court, after announcing that a showing of "discipline" was required, found that the plaintiff did not satisfy the prima facie case because he did not show an "adverse employment action." *Bowles*, 285 Fed. Appx. at 815. In another case, the Eighth Circuit states that the prima facie case requires a showing of "discipline" but then used the term interchangeably with "adverse employment action," ultimately finding that the prima facie case was not met because the plaintiff's discharge was based on absences used for reasons other than religious observances. *See Jones v. TEK Industries, Inc.*, 319 F.3d 355, 359 (8th Cir. 2003).

In the Ninth Circuit, the court variously describes the third element of the prima facie case. In *Proctor v. Consolidated Freightways*, 795 F.2d 1472, 1475 (9th Cir. 1986), and in the later unpublished decision in *Hussein v. Raban Supply Co.*, 1996 U.S. App. LEXIS 5249, *4 (9th Cir. 1996), the court stated that the prima facie case required evidence that the plaintiff was "discharged" even though other circuit decisions before and since have stated that the required showing includes "threat of discharge (or of other adverse employment action)." *EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610, 614 n. 5 (9th Cir. 1988); *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 405 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993). As the Ninth Circuit explained, "we have occasionally used language implying that the employer must *discharge* the employee" but "we have never in fact required that the employee's penalty for observing his or her faith be so drastic." *EEOC v. Townley Engineering, & Mfg. Co.*, 859 F.2d at 614 n.5.

The Petitioner and his amici have not cited a single case in which a religious accommodation claim was dismissed because the plaintiff suffered an adverse employment action that took some form other than discharge and discipline. Indeed, as the Petitioner candidly admits, Pet. 12-13, in each of the cited cases that employ the phrase "discharge" or "discharge or disciplined," the plaintiff did establish a prima facie case by showing that he was either discharged or otherwise denied employment.[4] Like the decision below, the cited cases finding that a plaintiff has not established a prima facie case do so on the grounds that the plaintiff has not shown an "adverse employment action."[5]

The long and the short of the matter is that this Court

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[4] *Morrissette-Brown v. Mobile Infirmary Medical Center*, 506 F.3d 1317, 1320, n.1 (11th Cir. 2007)(plaintiff placed on personal leave of absence before employment terminated as voluntary resignation based on failure to return to work); *Beadle v. Hillsborough County Sheriff's Dept.*, 29 F.3d 589 (11th Cir. 1994)(plaintiff discharged); *Thomas v. National Association of Letter Carriers*, 225 F.3d 1149 (10th Cir. 2000)(plaintiff discharged); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481 (10th Cir. 1989)(plaintiff not hired); *Weber v. Roadway Express*, 199 F.3d 270 (5th Cir. 2000)(plaintiff truck driver stopped receiving driving assignments); *EEOC v. Firestone Fibers & Textile Co.*, 515 F.3d 307 (4th Cir. 2008)(plaintiff discharged); *Chalmers v. Tulon Co.*, 101 F.3d 1012 (4th Cir. 1996)(plaintiff discharged; prima facie case not proven because plaintiff did not meet the notice requirement of the prima facie case); *Shelton v. University of Med. & Dentistry*, 223 F.3d 220 (3d Cir. 2000)(plaintiff discharged).

[5] *Cruzan v. Special School District #1*, 294 F.3d 981 (8th Cir. 2002)(employer's decision to allow transgendered employees to use women's restroom not an adverse employment action); *Bowles*, 285 Fed. Appx. at 814 (2d Cir. 2008)(unpublished decision)(comments by supervisor that plaintiff should seek a job in the private sector if he wanted week-ends off not an adverse employment action). *See also Lawson v. Washington*, 296 F.3d 799, 805 (9th Cir. 2002)(no adverse employment action where plaintiff quit and was not constructively discharged and statements by employer did not involve threat "imposing discipline on him for refusing to comply").

"reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956). And, while the Petitioner attempts to manufacture a circuit conflict out of the various formulations that have been used in describing the adverse employment action element of a prima facie case of religious discrimination, he cannot point to a single judgment in a religious accommodation case that rests on a distinction between an "adverse employment action" requirement and any "requirement that an employee be discharged or disciplined as a condition of asserting a religious accommodation claim." Pet. 12.

II. The Sixth Circuit Correctly Applied The Criteria For A Prima Facie Case

Tacitly admitting that there is no conflict among the circuits with regard to the "adverse employment action" element of a prima facie case of religious discrimination, the Petitioner argues that "a religious accommodation case against a labor union" should be subject to different standards than a religious accommodation case against an employer. Pet. 21.

It is not surprising that neither Petitioner nor his amici cite a single religious accommodation case so holding. "Read literally, Title VII addresses only the obligation of an 'employer' to accommodate an employee's religious beliefs and observations. However, courts have uniformly imposed upon labor organizations the same duty to provide reasonable accommodation." *EEOC v. Union Independiente de la Autoridad*, 279 F.3d 49, 55 n. 7 (1st Cir. 2002), citing *Lutcher v. Musicians Union Local 47*, 633 F.2d 880, 884 (9th Cir. 1981) ("this court has consistently applied the [religious accommodation] provision to unions, on the theory that 'Title VII clearly imposes the same duty not to discriminate on a union as it does the employer'").

This case presents an especially inappropriate vehicle for the creation of an implied labor organization religious accommodation standard different from the standard applied to employers, since the employment practice being challenged here is the product of a collectively bargained agreement for which the employer and the union are equally responsible.

III. The Sixth Circuit Decision Is Not In Conflict With *Burlington Northern v. White*

Reed erroneously claims that the Sixth Circuit's decision is in conflict with *Burlington Northern & Santa Fe Railway Company v. White*, 548 U.S. 53 (2006). In *White* the Court held that, in a retaliation case under Title VII, the "adverse action" that serves as the basis for a retaliation claim need not be related to the terms and conditions of the plaintiff's employment. In a retaliation suit, the issue may be whether conduct that does not alter terms or conditions of employment can be sufficient to deter an employee from complaining about unlawful discrimination and whether such conduct should be actionable. The Court in *White* held that it was.

The Sixth Circuit decision in this case does not involve any application of *White*. Here the issue is whether the employer and union need to offer a reasonable accommodation to resolve a conflict between an employee's religious belief and the union security provisions of a collective bargaining agreement. That issue necessarily involves application of terms and conditions of employment. There is no indication in this case that Reed suffered any "adverse action" unrelated to the application of the union security provisions in the CBA and the related Letter Agreement. The Sixth Circuit neither relied on nor distinguished *White* because the holding in that case has nothing to say about the issue before the Sixth Circuit.

IV. Petitioner Was Provided A Reasonable Accommodation

While the foregoing is sufficient to dispose of the petition for certiorari, we would be remiss if we did not briefly show that both the district judge and the concurring circuit judge were correct in their conclusion that the accommodation accorded the Petitioner was reasonable. Pet. App. 12a-14a, 66a-71a. The accommodation was provided under negotiated provisions of the UAW and AM General Collective Bargaining Agreement which includes "a union security provision under which all AM General employees must either become UAW members or pay the union an agency fee equal to the amount of membership dues." *Id.* at 2a. "UAW and AM General also are parties to a letter agreement that allows any employee with a *bona fide* religious objection to joining or supporting a labor union to satisfy his union security obligation by making a payment equal to full membership dues to one of three charities mutually designated by UAW and AM General." *Ibid.*

The religious accommodation set forth in the UAW/AM General letter agreement is the accommodation expressly mandated by Section 19 of the National Labor Relations Act, 29 U.S.C. § 169, which provides:

> "Any employee who [has bona fide religious] objections to joining or financially supporting labor organizations . . . may be required in a contract between such employee's employer and a labor organization in lieu of period dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund . . . chosen by such employee from a list of at least three such funds, designated in such contract."

This provision was enacted by Congress specifically to harmonize the duty to accommodate employee religious views under Title VII and the right to enforce lawful union securi-

ty provisions under the NLRA.[6] It is a religious accommodation that has been held to satisfy the requirements of Title VII by every circuit court that has considered the question. *See International Association of Machinists & Aerospace Workers v. The Boeing Company*, 833 F.2d 165 (9th Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988); *McDaniel v. Essex International, Inc.*, 696 F.2d 34 (6th Cir. 1982); *Nottelson v. Smith Steel Workers*, 643 F.2d 445 (7th Cir. 1981), *cert. denied*, 454 U.S. 1046 (1981); *Tooley v. Martin-Marietta Corporation*, 648 F.2d 1239 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981).

The Petitioner does not deny that the religious accommodation accorded him by the letter agreement completely eliminates any conflict between his religious beliefs and the requirements of the union security agreement. Rather, the Petitioner's sole basis for challenging this accommodation is that he would prefer to contribute to his chosen charity an amount less than the amount of dues. Petitioner's notion that a reasonable accommodation provided by his employer and union should be disallowed because he prefers another accommodation was rejected by this Court in *Ansonia*, 479 U.S. at 68. Because Title VII "directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation," this Court held in *Ansonia* that an employer is not required to provide a plaintiff's preferred accom-

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[6] "By accommodating the religious beliefs of these persons, the bill would make the National Labor Relations Act consistent with section 701(j) of the Equal Employment Opportunity Act which requires an employer to 'reasonably accommodate . . . . an employee's religious observance or practice without undue hardship.' 42 U.S.C. § 2000e(j). The option of allowing a qualifying individual the right to pay the equivalent of dues to a nonreligious charity clearly constitutes a "reasonable accommodation" to the individual's religious beliefs." 126 Cong. Rec. 2580 (Feb. 11, 1980).

modation and "where the employer has already reasonably accommodated the employee's religious needs, the statutory enquiry is at an end." *Id.*

The Petitioner's challenge is based on the circumstance that prior to lodging a religious objection to providing any financial support to the Union he had lodged an objection to financially supporting UAW activities that were not germane to collective bargaining and, under *Communications Workers v. Beck*, 487 U.S. at 735, was allowed to pay the Union a reduced agency fee. Pet. 21-22.

In *Beck*, this Court held that, while "Section 8(a)(3) of the National Labor Relations Act permits an employer and an exclusive bargaining representative to enter into an agreement requiring all employees in the bargaining unit to pay periodic union dues and initiation fees as a condition of continued employment," that provision does not "also permit a union, over the objections of dues-paying nonmember employees, to expend funds so collected on activities unrelated to collective bargaining, contract administration, or grievance adjustment." *Beck*, 487 U.S. at 738. The generally accepted union response to such an objection is an "advance reduction of dues" collected from the objecting employee, which prevents the use of such payments by the union "for purposes to which the employee objects." *Ellis v. Railway Clerks*, 466 U.S. 435, 444 (1984).

As a result of his subsequent religious objection, the Petitioner "is not paying any money to the union." Pet. 22. Thus, the question of the union "expend[ing] funds . . . collected [from the Petitioner] on activities unrelated to collective bargaining, contract administration, or grievance adjustment" does not arise. *Beck*, 487 U.S. at 738. Because Reed's payment goes entirely to charity with no money going to the UAW, the charity payments do not

implicate any concern of *Beck*, and nothing in that decision requires the employer and union to create a special accommodation for Petitioner.

As Petitioner's request for his preferred accommodation is not justified by *Ansonia* or mandated by *Beck*, he attempts to argue for a reduced payment to charity on the ground that his payment of the full union security amount to charity is discriminatory. To the extent this is an attempt to make a disparate treatment argument under the religious discrimination provisions of Title VII, Petitioner has waived that argument by expressly disavowing any disparate treatment claim in the proceedings below. Pet. App. 11a.

Petitioner's argument also finds no support in *Ansonia*. With respect to the facts before it, this Court in *Ansonia* found that requiring an employee to take unpaid leave for religious observance in excess of the paid leave days allowed under the governing collective bargaining agreement was a reasonable accommodation unless the employee could show that the contractually permitted paid leave was granted on a discriminatory basis, that is

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[7] Because the Court considered the record unclear on this issue, it remanded the case to the Second Circuit for further findings on past and existing practices in the administration of the leave provisions of the collective bargaining agreement. On remand, the Second Circuit affirmed supplemental findings by the district court that the CBA was administered according to its terms. Relying on the language of the Supreme Court's decision, the Second Court held that the conclusion that the accommodation provided was reasonable was compelled based on the supplemental district court's findings:

> "There is no evidence in the remand record to support a finding that leave may be taken pursuant to the 'necessary personal business' provisions of the Agreement for all purposes except religious ones."

Philbrook v. Ansonia Board of Education, 925 F.2d 47, 54 (2d Cir. 1991), *cert. denied*, 501 U.S. 1218 (1991).

"when paid leave is provided for all purposes *except* religion." *Ansonia*, 479 U.S. at 71. (emphasis in original).[7] Nothing in the record of this case supports a conclusion that any of the accommodations provided by AM General and the UAW are provided "for all purposes except religion" and therefore discriminatory under *Ansonia*. *Ibid.*

Under the AM General collective bargaining agreement and letter agreement with the UAW, an employee with religious objections to unions or union activities can be accommodated through reduced payments to the union or through full payment to charity, and Petitioner has enjoyed the right to choose among these options throughout his employment as he deems necessary to accommodate his religious beliefs. Pet. App. 56a-57a. There is no evidence that any of these options is being discriminatorily applied. Petitioner pays the exact same amount to charity as 1698 other employees who pay full union dues or agency payments, and he pays less to the union than all 1699 other bargaining unit employees. Pet. App. 69a. Nothing in *Ansonia* requires the employer to create a special accommodation for Petitioner when the uniformly administered accommodation he is receiving fully resolves any conflict between his religious beliefs and the union security provisions of the collective bargaining agreement.

The Petitioner does not contend that there are any decisions holding the accommodation mandated by Section 19 of the National Labor Relations Act to be unreasonable. *See* Pet. 21-22. Rather, the Petitioner merely suggests that the reasonableness of this accommodation is something the Court should settle "[a]t the same time" it addresses the principal question presented by the Petition. *Id.* at 27. However, Petitioner has failed to establish grounds warranting this Court's consideration of either issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

REPLY ARGUMENT

I. THE COURTS OF APPEALS ARE TRULY DIVIDED.

A. The "No Court" Challenge.

The United Auto Workers ("UAW") paints the different language used by the various circuits to describe "adverse action" as nothing more than a conflict in nomenclature, not reality. To prove this, the UAW asserts:

> No court has ever held that an employee failed to establish a prima facie case of religious discrimi-

> nation because he showed only that he suffered the kind of material harm courts characterize as an 'adverse employment action' but did not show 'discharge or discipline.'

UAW's Brief in Opposition to Petition for Writ of Certiorari ("UAW Opp."), p. 4.

The answer to the UAW's "no court" challenge is this very case. Both lower courts held that Mr. Reed failed to prove adverse action because he was not discharged or disciplined. App. 63a-64a (trial court); App. 7a, 12a (appeals court). The dissenting circuit judge below evaluated the majority opinion and concluded: "The majority opinion affirms based on Reed's failure to demonstrate either discharge or discipline as part of his prima facie case against his union." App. 14a.

The UAW's "no court" challenge is not just factually wrong, it is logically weak. The UAW challenges Mr. Reed to cite decisions from "discharge or discipline" circuits that *agree* with the Sixth Circuit, whereas conflict is more logically shown through cases that *disagree* with the decision below. The more relevant question is whether other circuits would consider the UAW's decision to charge Mr. Reed 22% more to keep his job an adverse action?

The answer is "yes." Although no other circuit has passed on the amount of the charity-substitution payment, the practical result of charging Reed more is to reduce his take-home pay. Those circuits that do not require proof of discharge or discipline in a religious accommodation case have all indicated in other Title VII contexts that a reduction in pay is an adverse action. *Nichols v. So. Ill. Univ.-Edwardsville*, 510 F.3d 772, 780 (7th Cir. 2007) ("employee's

compensation ... diminished"); *Noviella v. City of Boston*, 398 F.3d 76, 88 (1st Cir. 2005) ("reduction in pay"); *Ray v. Henderson*, 217 F.3d 1234, 1244 (9th Cir. 2000) ("adverse employment action [includes] decreased ... pay"); *Kerns v. Capital Graphics*, 178 F.3d 1011, 1016 (8th Cir. 1999) ("cuts in pay").

The UAW states that two judges on the court below found that Mr. Reed failed to show "any adverse employment action." UAW Opp., pp. 4-5. From this the UAW argues that there is no circuit conflict. The logical conclusion is just the opposite. If the Sixth Circuit believes that reducing an employee's take home pay because he has requested a religious accommodation is not "adverse action," this position highlights the huge disparity between the circuits as to what constitutes adequate proof of adverse action in a religious accommodation case.

The conflict among the circuits in the religious accommodation context is part of the greater conflict over what constitutes "adverse action" in other Title VII contexts. This Court has noted, "without endorsing the specific results," that the circuits took different positions on something this Court labeled "tangible employment action." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). "[T]angible employment action" is simply another way to describe "adverse action."

Among those circuits holding that a reduction in pay is an adverse action is the Second Circuit. Its decision in *Philbrook v. Ansonia Board of Education*, 757 F.2d 476 (2d Cir. 1985), *aff'd & remanded on other grounds*, 479 U.S. 60, 67 (1986), is of particular importance, and is discussed next.

B. This Court Previously Determined That Resolution of the Elements of a Prima Facie Case Is Worthy of This Court's Time, but Failed to Resolve the Elements.

The Second Circuit in *Ansonia* ruled that a choice "between giving up a portion of [the employee's] salary and his religious beliefs" is sufficient to meet the adverse action element. 757 F.2d at 482-83. By granting certiorari on that issue years ago, this Court determined that settling the question of what proof is required in a religious accommodation case is worthy of this Court's time. Unfortunately, after granting review, this Court did not reach the issue. The UAW attempts to blunt the obvious force of this argument in favor of review, by claiming that the petitioners in *Ansonia* did not challenge the Second Circuit's articulation of the elements of a prima facie case. UAW Opp., p. 6, n.3.

However the UAW may choose to interpret the petitioner's goals in *Ansonia*, this Court understood that it was being "asked to address whether the Court of Appeals erred in finding that Philbrook established a prima facie case of religious discrimination." 479 U.S. at 66. This Court noted that "Petitioner asks us to establish for religious accommodation claims a proof scheme ... delineating the plaintiff's prima facie case." This Court granted certiorari to establish the proof scheme for religious accommodation claims.

However, upon further examination of the record, this Court decided that "this case [*Ansonia*] raises no such issue" because the trial court had not dismissed the plaintiff's case for "want of a prima facie case." *Id.* at 67. This Court did not change its mind about the

worthiness of the issue. Instead, it found that it had been failed by the facts in the record. In contrast, Mr. Reed's case was dismissed by the trial court for want of a prima facie case. App. 66a.

C. Conflicting Statements of the Rule by the Circuit Courts Is Reason to Review.

The UAW points to the circuits cited by Mr. Reed as requiring something less than discharge or discipline, and argues that even those courts sometimes use the term "discipline," although proof of something substantially less is actually required. The UAW even quotes an admission by the Ninth Circuit that it sometimes uses the term "discharge," although it never requires proof of discharge. UAW Opp., pp. 6-7.

What conclusion follows from the fact that the circuit courts are not only treating the proof of these cases inconsistently, but also using inconsistent language – even within the same circuit? Since this Court has already decided that establishing the nature of the proof required in a religious accommodation case is an important federal question, highlighting the lower courts' confusion in both word and deed is reason to grant review, not deny it.

The most telling flaw in the UAW's "no conflict" argument is that it never attempts to show that charging Mr. Reed 22% more (and thereby reducing his take-home pay) falls short of adequate proof of "adverse action" in any of the five circuits that have disclaimed the "discharge or discipline" standard. The conflict between the judgments of those circuits and the Sixth Circuit as to the proof required is palpable.

II. CHARGING REED MORE THAN ALL OTHERS IS AN UNREASONABLE RELIGIOUS ACCOMMODATION.

To defend charging Mr. Reed 22% more than any other employee is required to pay to keep his or her job, the UAW cites to Section 19 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 169, and this Court's prior statement in *Ansonia* that an employee of faith does not get to choose his preferred accommodation.

Neither source helps the UAW. Although Section 19 uses the term "dues" to describe the amount of the religious objector's payment to charity, this Court determined that "dues" under the NLRA is a term of art that has been "whittled down to its financial core." *Communications Workers v. Beck*, 487 U.S. 735, 745 (1988) (citing *NLRB v. General Motors*, 373 U.S. 734, 742 (1963)). This maximum required payment, this "financial core" of the membership dues, does *not* include the amount spent on politics. *Beck*, 487 U.S. at 745-47, 762-63. For that reason, it is an unreasonable accommodation under Title VII for the UAW to ignore this Court's definition of "dues" and charge Mr. Reed more than financial core dues, simply because he has requested a religious accommodation.

Making an exception to the standard definition of dues to require employees of faith to pay more is not a question of employee preference, it is a matter of reasonableness. Mr. Reed already lost his preference when the UAW rejected his charity, the Disabled American Veterans, as an appropriate charity for his alternative payment. App. 3a. This Court in *Ansonia* declared that if the religious accommodation offered to an employee results in the employee being charged

more than his co-workers, it is not a "reasonable" accommodation, and therefore is unlawful under Title VII. 479 U.S. at 71. The amount Mr. Reed is required to pay is not about his preferences, but about a discriminatory and, therefore, unreasonable religious accommodation.

III. REED CORRECTLY IDENTIFIED HIS CLAIM.

According to the UAW, Mr. Reed's failure to plead his claim as one of disparate treatment precludes full consideration of the claims he now makes. UAW Opp., p. 14. *Ansonia* fully supports Reed's approach. *Ansonia* was an accommodation case, not a disparate treatment case. It ruled that a "reasonable accommodation" cannot be a discriminatory accommodation, because discrimination is the "antithesis of reasonableness." 479 U.S. at 70.

That holding forecloses the UAW's argument. An employee, pursuant to the "reasonable accommodation" provision of Section 701(j) of Title VII, 42 U.S.C. § 2000e(j), may challenge a discriminatory accommodation as being "unreasonable." Whatever else Reed might have pled, he claimed a reasonable accommodation right recognized by this Court. No one schooled in Title VII law would consider a union fee objection case (a request for an exception from the uniform dues requirement) to be a disparate treatment case. These are religious accommodation cases, and *Ansonia* teaches that religious accommodations are only reasonable (and therefore lawful) if the accommodation does not create some other type of discrimination against the employee of faith.

The UAW disputes the conflict with *Ansonia* by quoting that portion of the decision stating that

discrimination (in religious accommodation) exists "when paid leave is provided for all purposes *except* religion." UAW Opp., p. 15 (quoting *Ansonia*, 479 U.S. at 71). The UAW claims that nothing in the record shows that the UAW is providing accommodation "for all purposes except religion." UAW Opp., p. 15. A simple paraphrase of the quote from *Ansonia* to match the facts of this case unmasks the UAW's error: "when financial core dues are provided for all purposes *except* religion," unlawful discrimination exists. Financial core dues (dues reflecting only the UAW's collective bargaining costs and not its political expenses), are available ("provided") to every member of the bargaining unit except the religious objector, Mr. Reed. App. 2a. While others may voluntarily pay full dues, only Mr. Reed is coerced into paying that amount to retain his job – which is 22% higher than financial core dues.

The issue *Ansonia* did not reach is the very issue raised by Mr. Reed: What are the elements of a reasonable accommodation claim?

CONCLUSION

Resolving the elements of a prima facie case of religious accommodation will determine whether the Sixth Circuit has rightly held that employees of faith can be forced to make the cruel choice between supporting their family and obeying God. No employee should have to suffer discharge or discipline as a prerequisite to being heard in court. It is an important matter for employee faith and freedom.

The petition for writ of certiorari should be granted to eliminate the conflict among the circuits as to what an employee of faith must prove to claim a religious accommodation, to bring to an end the turmoil in the

lower courts, and to protect employees from having to choose between their God and their job. This Court should also determine whether it is a reasonable accommodation for a union to require that a religious objector pay more than any other employee is forced to pay to retain employment.

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JEFFREY J. REED,

Petitioner,

v.

INTERNATIONAL UNION, AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED

1. Title VII requires unions to reasonably accommodate employees' religious beliefs. Must an employee suffer discharge or discipline as a prerequisite to challenging the reasonableness of a labor union's religious accommodation?

2. The lower courts have uniformly agreed that employees who have religious objections to supporting labor unions may, as a reasonable accommodation under Title VII, redirect their compulsory union fees to charity. Where a labor union requires that the religious objector must pay more than any other member of the bargaining unit to retain employment, is that a reasonable accommodation?

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Interest of *Amicus Curiae* [1]

Amicus curiae, the Center for Constitutional Jurisprudence, is an educational, litigation and advocacy program in constitutional law and jurisprudence located at Chapman University School of Law. Founded in 1999 as the public interest litigation arm of The Claremont Institute for the Study of Statesmanship and Political Philosophy, the Center provides legal representation and litigation support through the work of students and attorneys in cases of constitutional significance, advancing through its strategic litigation the Institute's mission of restoring the principles of the American Founding to their rightful and preeminent authority in our national life.

SUMMARY OF ARGUMENT

The petition for writ of certiorari in this action raises issues appropriate for Supreme Court review, first, to resolve conflicts among the circuits concerning the legal standards applicable to accommodation by labor unions of employees who have conscientious religious objections to union membership and, second, to address important questions of federal law concerning the statutory limits on the maximum union dues that can be charged to an objecting employee under the National Labor Relations Act as construed by this Court in *Communications Workers of America*

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[1]The Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent have been previously filed or are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

v. Beck (1988) 487 U.S. 735.

The maximum agency fee that a labor union can charge a non-member employee was set by this Court in *Beck* as limited to the costs of collective bargaining and employee representation. *Beck* at 487 U.S. at 759, 760, 762-763. The respondent union and the courts below have permitted the petitioner to be charged full union dues as the price of his religious accommodation. That violates the *Beck* construction of the National Labor Relations Act. The fact that the petitioner is being charged more than a political objector also raises potential constitutional considerations, but this action can be decided more simply by making explicit the application of the rule of *Beck* to religious accommodation agency fees.

The conflict among the circuits should be resolved in favor of the approach taken in the First, Second, Seventh, Eighth and Ninth Circuits, where the issue of "adverse employment action" is decided on the facts and circumstances of each case, rather than the "discharge or discipline" standard used in the Third, Fourth, Fifth, Tenth and Eleventh Circuits, and now the Sixth Circuit, particularly in the context of a religious accommodation claim against a labor union, which has no authority or capacity to "discharge or discipline" employees.

ARGUMENT

I. REQUIRING RELIGIOUS OBJECTORS TO UNION MEMBERSHIP TO PAY THE EQUIVALENT OF FULL UNION DUES IS NOT A REASONABLE ACCOMMODATION UNDER *COMMUNICATIONS WORKERS OF AMERICA V. BECK* AND THE NLRA.

Employers are required not to discriminate against employees on the basis of religion and to provide reasonable accommodation to the religious convictions and practices of their employees under Title VII of the Civil Rights Act of 1964, at 42 U.S.C. §2000e-2(a) and §2000e(j). Labor unions are required not to discriminate against their members on the basis of religion under Title VII at 42 U.S.C. §2000e-2(c), and, as acknowledged by the Sixth Circuit Court of Appeals decision in this matter, case law also has extended to labor unions the requirement to provide reasonable accommodation to the religious convictions and practices of their members. *Reed v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* (6th Cir. 2009) 569 F.3d 576, at 579, citing *Wilson v. NLRB* (6th Cir. 1990) 920 F.2d 1282, 1286 and *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico* (1st Cir. 2002) 279 F.3d 49, 55 n. 7.

The petition in this action presents an issue of the proper standard for religious accommodation by the respondent union for an employee, like the petitioner, who conscientiously objects to union membership on religious grounds. In *Communications Workers of*

America v. Beck (1988) 487 U.S. 735, this Court made two rulings that bear on this question. First, this Court construed Section 8(a)(3) of the National Labor Relations Act (NLRA), 29 U.S.C. §158(a)(3), to permit labor unions to require non-member employees to pay an agency fee equivalent to the dues paid by union members, to avoid "free riders" from obtaining the advantages of union representation without paying the dues required of union members for these services. 487 U.S. at 738, 744-756.

But, second, this Court ruled in *Beck* that the agency fees that labor unions can require from non-members under the NLRA are limited to the costs of collective bargaining and employee representation. 487 U.S. at 759 ("Congress understood §8(a)(3) to afford nonmembers adequate protection by authorizing the collection of only those fees necessary to finance collective-bargaining activities"), 760 ("the rationale underlying § 8(a)(3) . . . prohibit[s] the collection of fees that are not germane to representational activities").

> We conclude that § 8(a)(3) . . . authorizes the exaction of only those fees and dues necessary to "performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues."

Beck, 487 U.S. at 762-763, quoting *Ellis v. Railway Clerks* (1984) 466 U.S. 435, at 448 (construing the substantially identical language in the Railway Labor Act) (*Beck* at 742).

A letter agreement addendum to the collective bargaining agreement in this action provides that the accommodation offered to employees who object to

union membership on religious grounds is payment of an amount equivalent to full union dues to one of three charities mutually selected by the union and the employer. *Reed,* 569 F.3d at 578. The amount of this agency fee ("union security fee") is the central issue in this case.

Under *Beck* the law is clear that a union is limited to charging a non-member an agency fee equal to the amount of each union member's dues that go toward collective bargaining and representation. *Beck* at 487 U.S. at 759, 760, 762-763. But in this action the courts below have permitted the respondent union to charge the petitioner the full amount of union dues as the price of his religious accommodation, not just the portion attributable to collective bargaining and representation. The respondent union and the lower courts have isolated the rule of *Beck* to union members and non-members who object to supporting the union's political activities. *Reed* 569 F.3d at 578. That is inconsistent with this Court's analysis and holding in *Beck*.

Although the specific objection to the union dues in *Beck* addressed union political expenditures, the majority opinion of this Court in *Beck* did not rely on the First Amendment cases prohibiting compulsory support for union political expression in violation of principles of freedom of speech (e.g., *Abood v. Detroit Board of Education* (1977) 431 U.S. 209, 235-242). "Like the majority, I do not reach the First Amendment issue raised below by respondents. . . ." Justice Blackmun, joined by Justice O'Connor and Justice Scalia, concurring in part and dissenting in part, *Beck,* 487 U.S. at 763, footnote 1. The holding in *Beck* is entirely a statutory construction of the NLRA.

The practice of the respondent union of charging the petitioner an agency fee equal to the full amount of the union dues, including the portion used for political expenditures, violates the NLRA as construed in *Beck*.

II. THE CONFLICT AMONG THE CIRCUITS SHOULD BE RESOLVED IN FAVOR OF A FINDING THAT A RELIGIOUS ACCOMMODATION THAT VIOLATES *BECK* IS AN ADVERSE EMPLOYMENT ACTION AND *PER SE* UNREASONABLE.

The lead and concurring opinions in the Sixth Circuit decision below enshroud the *Beck* violation in a tangle of procedural obstacles and fail to reach the merits of the case, asserting that "Because Reed has not shown any material adverse employment action, much less discharge or discipline, his religious accommodation claim fails" (Justice Batchelder, lead opinion) and "Reed has not made out a prima facie case" (Justice Guy, concurring). 569 F.3d at 582.

But the petitioner is surely correct that this Sixth Circuit panel has chosen the wrong side of the issue in the conflict among the circuits over what constitutes an "adverse employment action" and whether "discharge or discipline" are required elements for such a showing. As cogently and succinctly presented in the Petition, the Third, Fourth, Fifth, Tenth and Eleventh Circuits, and now the Sixth Circuit, require some showing of "discharge or discipline" as the required adverse employment action before an employee can demonstrate that he or she has been a victim of religious discrimination and therefore entitled to reasonable accommodation. Whatever logic this

approach may have in the context of a religious accommodation complaint against an employer, it is wholly illogical in the context of a religious accommodation complaint against a labor union, which admittedly cannot either "discharge or discipline." The more functional and rational approach is that taken in the First, Second, Seventh, Eighth and Ninth Circuits, where the adverse employment action is a question of fact not limited to "discharge or discipline." See Petition, pages 11-18.

By being charged the amount of the full union dues as his mandatory alternative contribution to a charity under the collective bargaining agreement between the union and the petitioner's employer as the price of his religious accommodation, rather than only the portion of the dues attributable to collective bargaining and employee representation as required by *Beck* and the NLRA, the petitioner has satisfied the adverse employment action standard, as the dissenting opinion of Justice McKeague acknowledges:

> As discussed above, I believe that a materially adverse employment action is the appropriate standard for all religious accommodation claims. Reed satisfied that standard. The UAW required Reed to make larger payments than secular objectors. This disparity constitutes an adverse employment action.

Reed, 569 F.3d at 586.

However the elements of a cause of action and the standard of proof are characterized, an agency fee that violates the limits set by this Court in *Beck* is unlawful and *per se* unreasonable.

CONCLUSION

The Center for Constitutional Jurisprudence, as *amicus curiae,* respectfully urges this Court to grant the Petition herein and to hear and decide these important issues.

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IN THE

Supreme Court of the United States

JEFFREY J. REED,
Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AND THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF PETITIONER JEFFREY J. REED

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INTERESTS OF *AMICI CURIAE* [1]

Amici curiae are religious organizations that are deeply concerned about the impact of this case upon the ability of their members and other persons of faith to follow their religious beliefs when they conflict with general work requirements. The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church and represents nearly 59,000 congregations with more than 15 million members worldwide. In the United States the North American Division of the General Conference overseas the work of more than 5,000 congregations with more than one million members. The Seventh-day Adventist church has throughout its history defended religious liberty interests for its members and other individuals of faith.

The Ethics & Religious Liberty Commission (ERLC) is the moral concerns and public policy entity of the Southern Baptist Convention (SBC), the nation's largest Protestant denomination, with over 44,000 churches and 16.3 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as the sanctity of human life, ethics, and religious liberty. *Amici* are especially concerned that this Court should clarify the law and

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no such counsel or party made any monetary contribution intended to fund the preparation or submission of the brief. There are no persons other than *amici curiae*, their members and counsel who have made any such monetary contribution. Pursuant to Supreme Court Rule 37.4, *amici curiae* state that all counsel of record received timely notice of the intent to file this brief and consent has been granted by all parties.

resolve the current circuit split which results in significant disparity in the Title VII accommodation protection afforded to *amici*'s members and other persons of faith. Under existing case law, the scope of Title VII's accommodation protection is dependent solely upon the circuit in which the case is brought.

Some circuits provide no protection unless the employee is discharged. Some circuits (including the Sixth Circuit in the instant decision) afford protection only if the employee is discharged or disciplined. Other circuits interpret Title VII in a broader and more pragmatic fashion. Should the requirement of "discharge or discipline" applied below be permitted to stand as a pre-condition for administrative or judicial review of unresolved conflicts between work and religion, employees who are forced to make the hard choice between their beliefs and their jobs will find they have no legal recourse unless they resort to self-help and place their livelihoods at risk by refusing to follow the conflicting work requirement. Such a pre-condition would also render broad categories of work-religion conflicts (including those such as the instant case) immune to judicial review, even in cases of acknowledged discrimination.

For all these reasons, *amici* are strongly interested in and concerned about the outcome of this case. *Amici* address only Question One related to whether an employee must be discharged or disciplined to satisfy the adverse action element of a religious discrimination claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*.

SUMMARY OF ARGUMENT

Since its inception, Title VII has always included among its most important objectives the protection of religious rights in the workplace. The earliest versions of the statute identified the protected classes of "race, color, and religion." Francis J. Vaas, Title VII: Legislative History, 7 BOSTON COLLEGE INDUS. & COMMERCIAL LAW REVIEW 431 (1966). Recent trends have increased the importance of protecting religious rights in the workplace.

A survey has found that 66% of employees surveyed reported that they had witnessed religious discrimination in the workplace. Tanenbaum Center for Interreligious Understanding, *Religious Bias in the Workplace: The Employee's View* (1999) (executive summary *available at* http://www.tanenbaum.org/research_1999.html) (last visited January 15, 2010). Charges of discrimination filed with Equal Employment Opportunities Commission ("EEOC") based upon religion have increased nearly 50% over the last ten years, as has the percentage of charges based upon religion when compared to the total number of charges filed. U.S. Equal Employment Opportunity Commission, *EEOC Charge Statistics FY 1999 Through FY 2008* (*available at* http://archive.eeoc.gov/stats/charges.html) (last visited January 15, 2010).

This trend will continue in the future as the number of Americans who adhere to mainstream Christianity declines, minority religions gain more adherents, and religious pluralism and diversity increase. *See* Pew Forum on Religion and Public Policy, *The Demographics of Faith*, Aug. 20, 2008 (*available at* http://www.america.gov/st/diversity-english/2008/August/20080819121858cmretrop0.5310633.html) (last visited January 15, 2010). *Amici* urge the Court

to ensure that Title VII continues to provide meaningful protection for all religious workers faced with such difficult choices by eliminating the artificial barrier erected by the split decision below and the uncertainty that exists due to the split among the circuits on this important issue.

REASONS FOR GRANTING THE WRIT

A split panel of the Sixth Circuit below exacerbated the existing uncertainty in the law by concluding that a religious employee must be discharged or disciplined before he may challenge the reasonableness of a union's purported religious accommodation. This decision deepens the confusion among the circuits and is inconsistent with the language and intent of Title VII, with this Court's precedent, and is contrary to established public policy.

Title VII of the Civil Rights of 1964, 42 U.S.C. § 2000e *et seq*, makes it an "unlawful employment practice" for a labor organization or an employer to "discriminate against any individual" because of that individual's religion. 42 U.S.C. § 2000e-2(a)(1) (employer); § 2000e-2(c)(1) (labor organization). Title VII recognizes the limited role of a labor organization vis-à-vis the employer and employee by making it an unlawful employment practice for a labor organization to "cause or attempt to cause an employer to discriminate against an individual[.]" 42 U.S.C. § 2000e-2(c)(3).

Under Title VII, claims based upon religion, like claims based upon disability under the Americans With Disabilities Act of 1990, 42 U.S.C. § *12131 et seq*, are of two types: (1) disparate treatment and (2) failure to accommodate. *See Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1154-55 (10th Cir.

2000). Title VII makes clear that religion includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). This definition "somewhat awkwardly" incorporates the reasonable accommodation duty. *Ansonia Bd. of Ed. v. Philbrook*, 479 U.S. 60, 63 n.1 (1986). Thus, Title VII does not merely prohibit disparate treatment, but also imposes an affirmative duty to accommodate religious practice, where such accommodation may be accomplished without undue hardship on the employer. *See, e.g., EEOC v. United Parcel Service*, Inc., 94 F.3d 314, 318 n.3 (7th Cir. 1996).

Religious persons commonly adhere to religiously prescribed practices that simultaneously honor their God(s) and distinguish themselves from persons who do not share their religious beliefs. These religious practices frequently conflict with work requirements.

One of the most frequent conflicts between religion and work rules involves employees' observance of a weekly Sabbath and other holy days and employers' work scheduling. *See, e.g., Ansonia Bd. of Ed. v. Philbrook*, 479 U.S. 60 (1986); *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307 (4th Cir. 2008); *Jones v. United Parcel Service, Inc.*, 307 Fed. Appx. 864 (5th Cir. 2009) (*per curiam*); *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569 (7th Cir. 1997); *Sturgill v. United Parcel Service, Inc.*, 512 F.3d 1024 (8th Cir. 2008); *Balint v. Carson City*, 180 F.3d 1047 (9th Cir. 1999); *Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149 (10th Cir. 2000); *Morrissette-Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317 (11th Cir. 2007).

For example, Seventh-day Adventists, observant Jews, Seventh Day Baptists, members of the Church of God, and numerous other religious groups all observe a weekly Sabbath on Saturday, generally from sundown on Friday to sundown on Saturday. During these times, members of these groups believe they must abstain from most secular labor and employment. Other Christian denominations hold the same view regarding Sunday observance, and some Muslim groups participate in similar observances for periods of prayer on Fridays. In addition, Jewish, Muslim and Christian groups observe holy days that often occur during the business week.

Another issue of conflict that frequently arises in the workplace involves religious apparel and appearance. For example, many Muslim women believe the Koran requires them to cover their heads with scarves in public. *Webb v. City of Philadelphia*, 562 F.3d 256 (3rd Cir. 2009). Other Muslim women cover their entire body, leaving only their face and hands exposed. *United States v. Board of Ed. for the Sch. Dist. of Philadelphia*, 911 F.2d 882 (3rd Cir. 1990). Some Muslim males wear a religiously mandated head covering, or kufi. *Rattler v. Sublett*, 1998 U.S. App. LEXIS 10213 (9th Cir. 1998); *St. Claire v. Cuyler*, 634 F.2d 109 (3rd Cir. 1980). Sikhs are required by their religious commitments to wear turbans and beards. *Bhatia v. Chevron USA, Inc.*, 734 F.2d 1382 (9th Cir. 1984). Conservative and Orthodox Jews believe they must wear head coverings, such as hats or yarmulkes. *Goldman v. Weinberger*, 475 U.S. 503 (1986). Rastafarians are required to wear their hair in long dreadlocks. *Booth v. Maryland*, 327 F.3d 377 (4th Cir. 2003). Some Rastafarians wear loose fitting "crowns" over their dreadlocks. *Benjamin v. Coughlin*, 905 F.2d 571 (2nd Cir.), cert. denied, 498

U.S. 951 (1990). Other religious persons do not cut or shave their body hair. *Potter v. District of Columbia*, 558 F.3d 542 (D.C. Cir. 2009) (unidentified religiously motivated refusal to shave beard); *Martinelli v. Dugger*, 817 F.2d 1499 (11th Cir. 1987), *cert. denied*, 484 U.S. 1012 (1988) (Greek Orthodox limits upon shaving beard and cutting hair); *Friedman v. Arizona*, 912 F.2d 328 (9th Cir.), *cert. denied*, 498 U.S. 1100 (1990) (Orthodox Jewish limits upon shaving beard); *Gallahan v. Hollyfield*, 670 F.2d 1345 (4th Cir. 1982) (*per curiam*) (Native American limits upon cutting hair).

A third area of frequent work-religion conflict involves religious expression. Forty eight percent of Americans recently surveyed had discussed religion in the workplace in the past twenty-four hours. *See* George Gallup, Jr. & Timothy Jones, *The Next American Spirituality: Finding God in the Twenty-First Century*, at 72 (2000) (cited in U.S. Equal Employment Opportunity Commission, EEOC Compliance Manual, Section 12, at n. 111 (*available at* http://www.eeoc.gov/policy/docs/religion.html#_ftn111) (last viewed January 15, 2010). As is true with observance of holy days and religious apparel and appearance, religious expression takes many forms. Some religious employees display religious books, icons or messages on their persons or at their work stations. Others engage in one-on-one discussions regarding religious beliefs, distribute literature, or use religious greetings. Other religious employees engage in prayer at their work stations or in other areas of the workplace, and some employers sponsor prayer meetings or other religious expression. *See, e.g., Knight v. Connecticut Dep't of Pub. Health*, 275 F.3d 156 (2nd Cir. 2001) (employee evangelism of clients); *Young v. Sw. Sav. & Loan Ass'n*, 509 F.2d 140 (5th

Cir. 1975) (staff meetings beginning with religious exercises); *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470 (7th Cir. 2001) (employee's use of phrase "Have a Blessed Day"); *Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995) (supervisor's prayers during meetings); *Berry v. Dep't of Social Servs.*, 447 F.3d 642 (9th Cir. 2006) (employee's display of religious items in cubicle and discussion of religion with clients); *Draper v. Logan County Pub. Library*, 403 F. Supp. 2d 608 (W.D. Ky. 2005) (employee's wearing necklace with cross); *Banks v. Serv. Am. Corp.*, 952 F. Supp. 703 (D. Kan. 1996) (employee's greeting customers with "God Bless You" and "Praise the Lord"); *Rivera v. Choice Courier Sys., Inc.*, 2004 WL 1444852 (S.D.N.Y. June 25, 2004) (employee's wearing of "Jesus is Lord" patch).

These practices do not reflect mere personal preference or desire. Believers understand them as divine requirements which they are obligated to obey to maintain good standing within their faith. Most such religious groups do not grant "exemptions" or "dispensations" from these requirements because the requirements are viewed as part of God's law. However, *amici* are mindful that the faith of some religious persons is weaker than that of others. Some religious persons will succumb to the temptation to commit a sin by violating their conscience, or "fall away" from the faith altogether when faced with a conflict between work and religion.

The faith of these most susceptible persons should not therefore be subject to less protection merely because they succumb to the very temptation proscribed by Title VII, but this is the inevitable result of the "discharge or discipline" requirement. Moreover, the uncertainty in the law governing the

accommodation obligation creates an additional difficulty in reaching effective accommodations because the participants in that process do not have clear guidance as to what is expected of them. Unless this Court resolves this circuit split and provides such guidance, these most vulnerable members receive no effective protection under Title VII in several circuits.

The current conflicted state of the law is troubling to *amici* for another reason. Some religious groups have developed theological methods to address apparently conflicting religious duties. For example, the Church of Jesus Christ of Latter-day Saints has adopted the view that where the religious obligation to keep the Sabbath necessarily and unavoidably conflicts with the obligation to support one's family (as is the case where an employee's job is placed in jeopardy due to Sabbath observance), the obligation to support one's family takes precedence. Likewise, Seventh-day Adventists acknowledge that certain types of labor in service to others (*e.g.*, healthcare professions) may occur without violating the Sabbath, as long as that labor is necessary and unavoidable.

In such cases, religious employees faced with an employer's intransigent mandate to work on a holy day may do so without violating their religious beliefs, as long as the requirement is necessary and unavoidable. However, the restrictive test employed by some circuits prevents any review of such mandates unless the employee refuses to work and is discharged or disciplined—even in cases where the employer admits that its work mandate was neither necessary nor unavoidable—merely because the religious employee complied "under protest" with the mandate. As a result, such cases are effectively removed from the protections of Title VII and are

administratively and judicially unreviewable, even when they are clear violations of Title VII. This Court should grant certiorari to correct this confusion among the circuits.

1. This Court should grant certiorari to preserve the language and intent of Title VII.

Amici urge this Court to grant certiorari to correct the Sixth Circuit's misinterpretation of Title VII and eliminate the uncertainty that it has created. The opinion of the Sixth Circuit requires "discharge or discipline" in order to satisfy the third (adverse action) element of a prima facie case for religious accommodation. Other circuits have even more restrictive interpretations—eliminating any protection unless the employee is discharged.

Title VII, by its plain language, applies to any and all forms of "discrimination" and failure to accommodate without any limitation other than undue hardship. The text of Title VII makes no reference to a requirement of "adverse action," let alone any requirement of "discharge or discipline" as a prerequisite to the right of religious accommodation. The clear statutory mandate to attempt accommodation is wholly inconsistent with any requirement that an employee must first suffer discharge or discipline before being eligible for accommodation. This Court should grant certiorari to eliminate this confused state of the law and clarify the respective obligations of labor organizations, employers and employees on this important issue.

2. This Court should grant certiorari to correct the Sixth Circuit's continued misinterpretation of adverse action under Title VII in a manner contrary to *White v. Burlington Northern & Santa Fe Ry.*, 548 U.S. 53 (2006).

Amici urge this Court to correct the Sixth Circuit's continued misinterpretation of adverse action under Title VII. In *White v. Burlington N. & Santa Fe Ry.*, 364 F.3d 789, 799 (6th Cir. 2004) (*en banc*), *aff'd*, 548 U.S. 53 (2006), the Sixth Circuit concluded that the standard for adverse action was uniform across all Title VII claims. This Court granted certiorari and rejected any such uniform standard. Interpreting identical statutory language, this Court expressly adopted a standard that was satisfied whenever the challenged conduct "might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *White v. Burlington N. & Santa Fe Ry.*, 548 U.S. 53, 68 (2006) (internal citation omitted). This standard is not limited to discriminatory actions that affect the terms and conditions of employment, much less to discharge or discipline. *Id.* at 62-64.

White made clear that the adverse action element differs significantly in a retaliation claim as compared to a claim under the substantive anti-discrimination provisions of Title VII. *White* also made clear that context is critical because "a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for 'an act that would be immaterial in some situations is material in others.'" 548 U.S. at 69 (internal citation omitted). This Court provided the following explanation and illustrations:

> The significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. "The real social impact of workplace behavior often depends on a constellation of circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination.

Id. (internal citations omitted). Clearly, the schedule change and lunch invitation which this Court provided as examples of possible adverse actions in *White* are not "discharge or discipline" and would not satisfy the conflicting standard employed by some circuits.

This Court based the distinction upon the proscriptive language of the retaliation provision in Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), which like Section 703(c)(1), 42 U.S.C. § 2000e-2(c)(1), prohibits "discriminat[ion] against" an individual. In contrast, the proscriptive language in Section 703(a)(1), 42 U.S.C. § 2000e-2(a)(1), prohibits discrimination only "with respect to his compensation, terms, conditions, or privileges of employment." *See White*, 548 U.S. at 62, 67. These terms in Section 703(a)(1) "explicitly limit the scope of that provision to actions that affect

employment or alter the conditions of the workplace." *Id.* at 62.

Neither of the provisions relating to religious accommodation by a labor organization contain such limiting language. Section 703(c)(1) mirrors Section 704(a), and the definition of religion in Section 701(j), 42 U.S.C. § 2000e(j), makes clear that accommodation is not limited to the terms and conditions of employment. Like Section 704(a), Title VII's accommodation requirement (Section 701(j)) and anti-discrimination provision (Section 703(c)(1)) are stated without the limiting language found in Section 703(a)(1). Moreover, while omitting the limiting language of Section 703(a)(1), Section 701(j) expressly states a different limiting principle—"undue hardship on the conduct of the employer's business." These sections of the statute should therefore be interpreted *in pari materia* with the identical language that this Court addressed in *White*.

The split Sixth Circuit repeated the same error that circuit made in *White*. As a result of this error, the religious employee's standing vis-à-vis her labor organization is now uncertain. The circuits are in disarray, as is shown by their fractured approach to this important issue. In those circuits acting consistently with this Court's decision in *White*, the right of religious accommodation extends to anything that might dissuade a reasonable worker from exercising her religion—for example, the schedule change or lunch invitation given as examples in *White*.

In contrast, none of these actions satisfy the Sixth Circuit's standard, as none involve discharge or discipline. Indeed, under the Sixth Circuit's "discharge or discipline" standard, claims against a labor organization are a dead letter, as a labor organization can

neither discipline nor discharge a member. This is particularly problematic where a single standard is applied to claims against both labor organizations and employers. *See* Pet. App. 8a, 20a. This Court should, as it did in *White*, grant certiorari to bring the Sixth Circuit into conformity with the proper interpretation of adverse action under Title VII's religious accommodation provisions.

3. This Court should grant certiorari to resolve the split among the circuits and clarify the scope of adverse action in the religious accommodation context.

In the Sixth Circuit, an employee must prove that "he was discharged or disciplined for failing to comply with the conflicting employment requirement." Pet. App. 6a. As the dissent below noted, at least five other circuits employ a different, less restrictive standard under which "an adverse employment action short of discharge or discipline is sufficient to establish the prima facie case for religious accommodation." App. 17a. The Sixth Circuit's express requirement that an employee be discharged or disciplined as a condition of asserting a religious accommodation claim exacerbates a three way circuit split. At one extreme are the highly restrictive tests employed by the Fifth, Tenth, and Eleventh Circuits which require discharge in order to establish a prima facie case. Only marginally less restrictive are the Third, Fourth, and Sixth Circuits, which require discharge or discipline. A third group—the First, Second, Seventh, Eighth and Ninth Circuits—employ varying standards which are more consistent with this Court's analysis in *White*.

The discharge only circuits: Religious accommodation cases from the Tenth and Eleventh Circuits

make clear that under their extreme interpretation of Title VII, the adverse action element of a prima facie case is satisfied only by discharge. *Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000) (defined as "he or she was fired for failure to comply with the conflicting employment requirement"); *Morrissette-Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1321 (11th Cir. 2007) (defined as "he was discharged for failing to comply with the conflicting employment requirement").

The Fifth Circuit appears to have recently migrated from the "discharge or discipline" group into this most restrictive group. The Fifth Circuit once used the term "disciplined" to describe the adverse action element. *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984). However, recent case law replaces the term "disciplined" with "discharged" in defining adverse action. *Weber v. Roadway Express, Inc.*, 199 F.3d 270, 273 (5th Cir. 2000).

Under the discharge standard employed by these three circuits, the examples of adverse action offered by this Court in *White* would never constitute adverse action under the identical statutory language applicable to religious accommodation.

The discharge or discipline circuits: In addition to the Sixth Circuit, the Third and Fourth Circuits are slightly less restrictive, requiring only discipline rather than limiting adverse action solely to discharge. *Shelton v. Univ. of Med. & Dentistry of New Jersey*, 223 F.3d 220, 224 (3rd Cir. 2000) (defined as "she was disciplined for failing to comply with the conflicting requirement"). The Fourth Circuit apparently once permitted action short of discipline to satisfy the adverse action element. Pet. App. 17a (citing *Ali v.*

Alamo Rent-A-Car, Inc., 8 Fed. Appx. 156, 158-59 (4th Cir. 2001)). This circuit has now drifted into the discharge or discipline camp. *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 311-12 (4th Cir. 2008) (element defined as "he or she was disciplined for failure to comply with the conflicting employment requirement").

Even under the less restrictive discharge or discipline standard employed by these three circuits, the examples of adverse action offered by this Court in *White* would never constitute adverse action under the identical statutory language applicable to religious accommodation.

The "White" circuits:[2] The First, Second, Seventh, Eighth and Ninth Circuits allow the adverse action element to be satisfied by something less than discharge or discipline. These circuits apply standards for adverse action that are more akin to *White*, although they vary in formulation and scope, ranging from among other things, a "material" change in title or duties in the Second Circuit, to mere "tangible" changes in the Eighth Circuit, to any change "of consequence" to an employee in the First and Seventh, to the "mere threat" of such a change in the Ninth Circuit.

Of these circuits, the Second and Eighth are among the more restrictive. *In Bowles v. New York City Transit Auth.*, 285 Fed. Appx. 812 (2nd Cir. 2008) (*per curiam*), the Second Circuit defined the adverse action element as "a 'materially adverse change in the terms and conditions of employment' . . . [and]

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[2] These circuits have employed varying definitions of adverse action that are generally consistent with *White*, although they have done so without explicit reference to *White*.

may include 'termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation.'" *Id.* at 814 (quoting *Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217, 225 (2nd Cir. 2006), *cert. denied*, 549 U.S. 1342 (2007)).

The approach of the Eighth Circuit is formulated differently than that of the Second Circuit, requiring only "a 'tangible change in duties or working conditions that constitute [sic] a material employment disadvantage.'" *Cruzan v. Special Sch. Dist., No. 1*, 294 F.3d 981, 983-84 (8th Cir. 2002). Under this standard, "[m]ere inconvenience without any decrease in title, salary, or benefits is insufficient to show an adverse employment action." *Id.* at 984.

Under the "material" and "tangible" change standards employed by these two circuits, treatment of the examples of adverse action in *White* is unclear. The change in schedule given as an example in *White* likely would constitute an adverse action if viewed in proper context, although the lunch invitation referred to in *White* very well might not constitute adverse action, even when viewed in context.

The approach of the First and Seventh Circuits is significantly broader. The First Circuit states the third element of a prima facie case merely as "adverse employment action" without further definition. *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 55 (1st Cir. 2002). Cases following this definition have interpreted it as applying to "something of consequence" to the employee. *See, e.g., Brown v. F.L. Roberts & Co.*, 419 F. Supp.2d 7, 13-14

(D. Mass. 2006) (lateral transfer without loss of benefits constituted adverse action).

The Seventh Circuit, in *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1575 (7th Cir. 1997), stated the standard as "discharge or other discriminatory treatment." Under this standard, an employee who was neither discharged nor disciplined satisfied a prima facie case where his employer refused to allow him to take position with "public contact" because of a religiously motivated refusal to shave his beard. *EEOC v. United Parcel Service, Inc.*, 94 F.3d 314, 315 (7th Cir. 1996).

Under the standards employed by these two circuits, the examples of adverse action in *White* would constitute adverse action.

The Ninth Circuit states the standard even more broadly, finding the adverse action element to be established by a mere threat of such action. *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 655 (9th Cir. 2006) ("the employer, at least implicitly, threatened some adverse action"); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004) ("discharged, threatened, or otherwise subjected . . . to an adverse employment action"). Under this standard, the examples of adverse action in *White*—indeed, the mere threat of such actions—would constitute adverse action.

The circuits are in total disarray as to what constitutes adverse action to satisfy the third element of a prima facie case. This uncertainty in the law results in disparate treatment of *amici*'s members and other persons of faith throughout the country based upon nothing more than their geographic location. Further, this same uncertainty makes it very difficult for

national organizations (including *amici*, labor organizations and employers) to adopt a principled and consistent approach to handling requests for religious accommodation. This Court should grant certiorari to dispel this confusion in the law.

4. This Court should grant certiorari to promote the vital public policy of preserving peace in the labor force.

Certiorari to clarify the requirements of Title VII would promote long-established public policy. The confusion among the circuits undermines the well-established policy of promoting peace among the labor force. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 14 (1990) (noting "vital national interests in industrial peace" and "substantial public interests as well"). The confusion created by the circuit split creates uncertainty and fosters resentment among religious employees who learn of workers elsewhere who received more favorable treatment. Such disparities in treatment poison the workplace by engendering hostility and undermine the integrity of the judicial process. Moreover, the more restrictive interpretation which requires a religious employee to resort to the self-help remedy of refusing to comply with an employer's directive in order to vindicate her right to religious accommodation unnecessarily promotes labor conflicts, since the employee otherwise could comply with the employer's demand, then seek resolution through the EEOC, and ultimately challenge the demand in court.

This policy of promoting labor peace has been implemented by careful regulation of attempts at self-help. *See Trans World Airlines, Inc. v. Independent Fed. of Flight Attendants*, 489 U.S. 426 (1989). The policy against self-help is particularly strong

where individual (rather than collective) self-help is concerned, and demonstrates a clear choice for the common sense proposition that where possible, workers should obey the directives of their employers and challenge them through established procedures later. *Fabricut, Inc. v. Tulsa Gen. Drivers*, 597 F.2d 227, 229-30 (10th Cir. 1979) ("It would not be workable if an insubordinate employee could resort to 'self help' . . . with impunity."). This policy remains unchanged by Title VII. *Argyropoulos v. City of Alton*, 539 F.3d 724, 733 (7th Cir. 2008) (Title VII "does not grant the aggrieved employee a license to engage in dubious self-help tactics").

A condition such as the Sixth Circuit's discharge or discipline requirement removes a religious employee's ability to seek meaningful assistance from the EEOC or challenge an employer's workplace directive after following the disputed directive. In so doing, the circuits requiring discharge or discipline have created an incentive for the generally disfavored remedy of self-help by an individual employee.

Under the restrictive test employed by some circuits, an employee ordered to work on a holy day, or to cut his religiously-required beard or hair, is faced with a Hobson's choice. If the employee complies with the employer's directive under protest, that employee has no avenue to seek vindication of his rights under Title VII, even in cases where it is undisputed that the employer could have provided a reasonable accommodation and acted in violation of Title VII. Likewise, an employee who is improperly ordered to cease religious expression must either engage in unreviewable self-censorship or else be subjected to discharge or discipline in order to obtain review of the directive, even where that order is a clear statutory violation.

As a result, the only method by which a religious employee may preserve her right to religious accommodation is to engage in self-help by refusing to obey the employer's directive and suffering the consequences of discharge or discipline.

By creating such a dilemma for employees, the restrictive circuits ensure that broad categories of claims by the most vulnerable religious workers who are most in need of Title VII's protections become wholly unreviewable. Conversely, this restrictive standard encourages otherwise unnecessary workplace disruptions since it ensures that the only way for a claim for religious accommodation to be successfully asserted is after discipline or discharge has been applied—thereby creating an artificial incentive for employees who wish to preserve their rights under Title VII to seek such discipline. This perverse incentive turns established policy on its head. This Court should grant certiorari to preserve the tranquility of the labor force and permit orderly adjudication of such disputes without unnecessary disruption of the workforce.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the petition for a writ of certiorari in order to eliminate the conflict among the circuits over what an employee of faith must prove to claim a religious accommodation, and to provide guidance to the lower courts, employers and persons of faith as to what forced choices are proscribed by Title VII.

Respectfully submitted,

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